THE RIGHTS OF PERSONS, ACCORDING TO THE TEXT OF BLACKSTONE:...

Sir William Blackstone

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THE
RIGHTS OF PERSONS,

ACCORDING TO THE

TEXT OF BLACKSTONE,

INCORPORATING THE

ALTERATIONS DOWN TO THE PRESENT TIME.

BY

JAMES STEWART,
OF LINCOLN'S INN, ESQ., BARRISTER AT LAW, M. P.

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INCORPORATING THE ALTERATIONS DOWN TO THE PRESENT TIME.

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ERRATA ET CORRIGENDA.

Page 9, n. [g]. line 2, after C. B., add '*and.*'
" 49, n. [z], for c. 7, read 'c. 32.'
" 65, n. [l], last line, for *stat.* 2, read '*stat.* 1.'
" 79, n. [z], line 2, for *note* read '*rule.*'
" 89, line 24, for 5 Ann. c. 6, 'read c. 5.'
" 107, n. [f], third line, for *note*, read '*slightly.*'
" 116, n. [x], for 3 Geo. I. c. 5, read 'c. 15.'
" 161, line 11, for c 24, read 'c. 144.'
" 190, line 12 from bottom, for 10 Geo. IV., read '9 Geo. IV.'
" 229, n. [e], for c. 27, read 'c. 10.'
" 289, n. [a], for c. 24, read 'c. 34.'
" 294, line 29, for 15 Edw. III., read '14 Edw. III.'
" 298, n. [p], line 2, for c. 12, read 'c. 10.'
" 330, line 3, *dele* '7 Geo. IV. c. 48.'
" 335, line 5, for 49 Geo. 3. c. 69, read '59 Geo. III. c. 32.'
" 343, n. [w], for 55 Geo. III. c. 44, read '5 Geo. IV. c. 44.'
" 423, n. [d], for 13 Eliz., read '31 Eliz.'

PREFACE.

The Commentaries of Mr. Justice Blackstone, as a work designed to give information on the laws of this country, may be considered in two lights. They may be viewed as a methodical and elegant statement of what the law was about sixty years ago, when they received the last corrections of their author, or as an authentic account of the law at the present day. In the former light their use remains unimpaired, and they must be read with profit by all who wish to study the legal history of Great Britain; but it is obvious that, in the latter, they have lost much of their original value. They can no longer be referred to for the existing law, and their practical advantages are thus unavoidably diminished. The lawyer may, indeed, know what part is now obsolete, or what statute has been repealed, but the general reader and the student are only able to guess at the alterations, or may be ignorant of them altogether.

This is so obvious, that had not the work, as a whole, surpassing merit, and did it not continue in many parts of great authority it would long since have fallen out of public notice; but it is still a most popular legal text-book, and is constantly referred to as well by professional as unprofessional readers. To render it suitable to the market therefore, the alterations have, to some extent, been added from time to time by editors of lesser or greater repute, by way of note. This mode of conveying the necessary information, it will hardly be disputed, is always an inconvenient and unsatisfactory one, more especially to the student; and it seemed to merit consideration, whether another mode might not be adopted; that of incorporating the alterations in the text, and endeavouring to render the whole work a continuous and uniform statement of the law as it stands at the present day.

The volume now presented to the reader, the foundation of which is the first volume of Blackstone's Commentaries, has been compiled on this plan, and the writer has been encouraged to proceed with it, by the favourable reception which the second volume* has met with, compiled in the main on the same plan.

In the present volume, as in the last, the desire has been to alter as little as possible, and not to overlay the text with matter unsuited to an elementary work, but simply to add the change made by statute or decision, always referring to the authority for the alteration. Where, however, the change is an important one, a full account of it has been given.

But there is this difference in the mode of editing this volume, that no portion of the original work has been omitted; and the text, with its illustrations and authorities, where no alteration has occurred, remains in its former state.

The present writer has endeavoured to give the effect of all the important constitutional alterations made in the present century, but he has not ventured to obtrude any political opinions of his own on the reader.

In undertaking the task, which he has now imperfectly performed, he was hardly aware of the labour he had imposed on himself. There is scarcely any chapter of the work which has not required most essential alteration, more especially occasioned by the extensive changes made in every department of the law within the last few years. That many of them have escaped him, in spite of some diligence, he cannot doubt, but having already experienced much indulgence at the hands of the profession, he is emboldened to ask for it once more.

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* See the Introduction to that work.

Lincoln's Inn,
March 1, 1839.

INTRODUCTION.

SECTION THE FIRST.

ON THE STUDY OF THE LAW.*

[4] Deficiency of knowledge of the law by English gentlemen.

THE science of the laws and constitution of our own country is a species of knowledge, in which the gentlemen of England have been more remarkably deficient than those of all Europe besides. In most of the nations on the continent where the civil or imperial law under different modifications is closely interwoven with the municipal laws of the land, no gentleman, or at least no scholar, thinks his education is completed, till he has attended a course or two of lectures, both upon the institutes of Justinian and the local constitutions of his native soil, under the very eminent professors that abound in their several universities. And in the northern parts of our own island, where also the municipal laws are frequently connected with the civil, it is difficult to meet with a person of liberal education, who is destitute of a competent knowledge in that science, which is to be the guardian of his natural rights and the rule of his civil conduct.

[5] Nor have the imperial laws been totally neglected even in the English nation. A general acquaintance with their decisions has ever been deservedly considered as no small accomplishment of a gentleman; and a fashion has at times

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* Among other alterations made in this section it is proper to observe, that it has been treated as a general essay on the Study of the Law, instead of a particular one addressed to the University of Oxford at the opening of the Vinerian Lectures.

prevailed, which, however, has much declined since the time of Blackstone, to transport the growing hopes of this island to foreign universities, in Switzerland, Germany, and Holland; which, though infinitely inferior to our own in every other consideration, have been looked upon as better nurseries of the civil, or (which is nearly the same) of their own municipal law. In the meantime it has been the peculiar lot of our admirable system of laws to be neglected, and even unknown, by all but one practical profession; though built upon the soundest foundations, and approved by the experience of ages.

Comparative merits of the Roman and English law.

Far be it from me to derogate from the study of the civil law, considered (apart from any binding authority) as a collection of written reason. No man is more thoroughly persuaded of the general excellence of its rules, and the usual equity of its decisions, nor is better convinced of its use as well as ornament to the scholar, the divine, the statesman, and even the common lawyer. But we must not carry our veneration so far as to sacrifice our Alfred and Edward to the manes of Theodosius and Justinian: we must not prefer the edict of the prætor, or the rescript of the Roman emperor, to our own immemorial customs, or the sanctions of an English parliament: unless we can also prefer the despotic monarchy of Rome and Byzantium, for whose meridians the former were calculated, to the free constitution of Britain, which the latter are adapted to perpetuate.

Without detracting therefore from the real merit which abounds in the imperial law, I hope I may have leave to assert, that if an Englishman must be ignorant of either the one or the other, he had better be a stranger to the Roman than the English institutions. For I think it an undeniable position, that a competent knowledge of the laws [6] of that society in which we live, is the proper accomplishment of every gentleman and scholar; an highly useful, I had almost said essential, part of liberal and polite education. And in this I am warranted by the example of antient Rome; where, as Cicero informs us,[a] the very boys were obliged to learn the twelve tables by heart, as a *carmen necessarium*, or indispensable lesson, to imprint on their tender minds an early knowledge of the laws and constitution of their country.

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[a] De Legg. 2. 23.

Division of the section.

But as the long and universal neglect of this study, with us in England, seems in some degree to call in question the truth of this evident position, it shall therefore be the business of this introductory discourse, in the first place to demonstrate the utility of some general acquaintance with the municipal law of the land, by pointing out its particular uses in all considerable situations of life. Some conjectures will then be offered with regard to the causes of neglecting this useful study: to which will be subjoined a few reflections on the peculiar propriety of reviving it in our own universities and inns of court.

The utility of some general acquaintance with municipal law;

And, first, to demonstrate the utility of some acquaintance with the laws of the land, let us only reflect a moment on the singular frame and polity of that land, which is governed by this system of laws. A land, perhaps the only one in the universe, in which political or civil liberty is the very end and scope of the constitution.[b] This liberty, rightly understood, consists in the power of doing whatever the laws permit;[c] which is only to be effected by a general conformity of all orders and degrees to those equitable rules of action, by which the meanest individual is protected from the insults and oppression of the greatest. As therefore every subject is interested in the preservation of the laws, it is incumbent upon every man to be acquainted with those at least with which he is immediately concerned; lest he incur the censure, as well as inconvenience, of living in society without knowing the obligations which it lays him under. And thus much may suffice for persons of [7] inferior condition, who have neither time nor capacity to enlarge their views beyond that contracted sphere in which they are appointed to move. But those on whom nature and fortune have bestowed more abilities and greater leisure, cannot be so easily excused. These advantages are given them, not for the benefit of themselves only, but also of the public: and yet they cannot, in any scene of life, discharge properly their duty either to the public or themselves, without some degree of knowledge in the laws. To evince this the more clearly, it may not be amiss to descend to a few particulars.

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[b] Montesq. Esp. L. l. II. c. 5.

[c] *Facultas ejus, quod cuique facere libet, nisi quid vi, aut jure prohibetur.* Inst. I. 3. 1. This has generally been considered to be an imperfect definition of civil liberty. Mr. Justice Coleridge cites, as preferable, the following definition from Locke:—"Freedom of men under government, is to have a standing rule to live by common to every one of that society, and made by the legislative power erected in it; a liberty to follow my own will in all things, where the rule prescribes not, and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man." *On Government*, b. II. c. 4.

More especially to gentlemen of independent fortune as owners of property.

Let us therefore begin with our gentlemen of independent estates and fortune, the most useful as well as considerable body of men in the nation; whom even to suppose ignorant in this branch of learning is treated by Mr. Locke[d] as a strange absurdity. It is their landed property, with its long and voluminous train of descents and conveyances, settlements, entails, and incumbrances, that forms the most intricate and most extensive object of legal knowledge. The thorough comprehension of these, in all their minute distinctions, is perhaps too laborious a task for any but a lawyer by profession: yet still the understanding of a few leading principles, relating to estates and conveyancing, may form some check and guard upon a gentleman's inferior agents, and preserve him at least from very gross and notorious imposition.

Again, the policy of all laws has made some forms necessary in the wording of last wills and testaments, and more with regard to their attestation.[e] An ignorance in these must always be of dangerous consequence, to such as by choice or necessity compile their own testaments without any technical assistance. Those who have attended the courts of justice are the best witnesses of the confusion and distresses that are hereby occasioned in families; and of the difficulties that arise in discerning the true meaning of the testator, or sometimes in discovering any meaning [8] at all: so that in the end his estate may often be vested quite contrary to these his enigmatical intentions, because perhaps he has omitted one or two formal words, which are necessary to ascertain the sense with indisputable legal precision, or has executed his will in the presence of fewer witnesses than the law requires.

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[d] Education, §. 187.

[e] 1 Vict. c. 26.

As serving on juries.

But to proceed from private concerns to those of a more public consideration. All gentlemen of fortune are, in consequence of their property, liable to be called upon to establish the rights, to estimate the injuries, to weigh the accusations, and sometimes to dispose of the lives of their fellow-subjects, by serving upon juries. In this situation they have frequently a right to decide, and that upon their oaths, questions of nice importance, in the solution of which some legal skill is requisite; especially where the law and the fact, as it often happens, are intimately blended together. And the general incapacity, even of our best juries, to do this with any tolerable propriety, has greatly debased their authority; and has unavoidably thrown more power into the hands of the judges, to direct, control, and even reverse their verdicts, than perhaps the constitution intended.

As justices of the peace.

But it is not as a juror only that the English gentleman is called upon to determine questions of right, and distribute justice to his fellow-subjects: it is principally with this order of men that the commission of the peace is filled. And here a very ample field is opened for a gentleman to exert his talents, by maintaining good order in his neighbourhood; by punishing the dissolute and idle; by protecting the peaceable and industrious; and, above all, by healing petty differences and preventing vexatious prosecutions. But, in order to attain these desirable ends, it is necessary that the magistrate should understand his business; and have not only the will, but the power also, (under which must be included the knowledge) of administering legal and effectual justice. Else, when he has mistaken his authority, through passion, through ignorance, or absurdity, he will be the object of contempt from his inferiors, and of censure from those to whom he is accountable for his conduct. [9]

And as members of Parliament.

Yet farther; most gentlemen of considerable property, at some period or other in their lives, are ambitious of representing their country in parliament: and those, who are ambitious of receiving so high a trust, would also do well to remember its nature and importance. They are not thus honourably distinguished from the rest of their fellow subjects, merely that they may privilege their persons; that they may list under party banners; may grant or withhold supplies; may vote with or vote against a popular or unpopular administration; but upon considerations far more interesting and important. They are the guardians of the English constitution; the makers, repealers, and interpreters of the English laws; delegated to watch, to check, and to avert every dangerous innovation; to propose, to adopt, and to cherish any solid and well-weighed improvement; bound by every tie of nature, of honour, and of religion, to transmit that constitution and those laws to their posterity, amended if possible, at least without any derogation. And how unbecoming must it appear in a member of the legislature to vote for a new law, who is utterly ignorant of the old! what kind of interpretation can he be enabled to give, who is a stranger to the text upon which he comments! Besides, the duties of a member of the house of commons are frequently judicial as well as legislative, and the absence of some knowledge of the law has of late been the cause of much deserved reproach to this branch of the legislature.

Indeed it is perfectly amazing, that there should be no other state of life, no other occupation, art, or science, in which some method of instruction is not looked upon as requisite, except only the science of legislation, the noblest and most difficult of any. Apprenticeships are held necessary to almost every art, commercial or mechanical: a long course of reading and study must form the divine, the physician, and the practical professors of the laws: but every man of superior fortune thinks himself *born* a legislator. [10] Yet Tully was of a different opinion; "it is necessary," says he,[e] "for a senator to be thoroughly acquainted "with the constitution: and this, he declares, is a know-

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[e] De Legg, 3, 18. *Est senatori necessarium nosse rempublicam; idque late patet:—genus hoc omne scientiae, diligentiae, menoriae est; sine quo paratus esse senator nullo pacto potest.*

" ledge of the most extensive nature; a matter of science, " of diligence, of reflexion: without which no senator can " possibly be fit for his office."

Mischiefs arising from ignorant legislation.

The mischiefs that have arisen to the public from inconsiderate alterations in our laws, are too obvious to be called in question; and how far they have been owing to the defective education of our senators, is a point well worthy of the public attention. The common law of England has fared like other venerable edifices of antiquity, which rash and unexperienced workmen have ventured to new dress and refine, with all the rage of modern improvement. Hence frequently its symmetry has been destroyed, its proportions distorted, and its majestic simplicity exchanged for specious embellishments and fantastic novelties. For, to say the truth, almost all the perplexed questions, almost all the niceties, intricacies, and delays, (which have sometimes disgraced the English, as well as other courts of justice) owe their original, not to the common law itself, but to innovations that have been made in it by acts of parliament; " overladen (as Sir Edward Coke expresses it[f]) with pro- " visoes and additions, and many times on a sudden penned " or corrected by men of none or very little judgment in " law." This great and well-experienced judge declares, that in all his time he never knew two questions made upon rights merely depending upon the common law; and warmly laments the confusion introduced by ill-judging and unlearned legislators. " But if," he subjoins, " acts of par- " liament were after the old fashion penned, by such only as " perfectly knew what the common law was before the making " of any act of parliament concerning that matter, as also " how far forth former statutes had provided remedy for " former mischiefs, and defects discovered by experience; " then should very few questions in law arise, and the [11] " learned should not so often and so much perplex their " heads to make atonement and peace, by construction of " law, between insensible and disagreeing words, sentences, " and provisoes, as they now do." And if this inconvenience was so heavily felt in the reign of queen Elizabeth, you may judge how the evil is increased in later times, when the statute book is swelled to twenty times a larger bulk: unless it should be found, that the penners of our modern statutes have proportionably better informed themselves in the knowledge of the common law.

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[f] 2 Rep. Pref.

Former remarks applicable to the nobility. What is said of our gentlemen in general, and the propriety of their application to the study of the laws of their country, will hold equally strong or still stronger with regard to the nobility of this realm, except only in the article of serving upon juries. But, instead of this, they have several peculiar provinces of far greater consequence and concern; being not only by birth hereditary counsellors of the crown, and judges upon their honour of the lives of their brother-peers, but also arbiters of the property of all their fellow subjects, and that in the last resort. In this their judicial capacity they are bound to decide the nicest and most critical points of the law: to examine and correct such errors as have escaped the most experienced sages of the profession, the lord keeper and the judges of the courts at Westminster. Their sentence is final, decisive, irrevocable: no appeal, no correction, not even a review, can be had: and to their determination, whatever it be, the inferior courts of justice must conform; otherwise the rule of property would no longer be uniform and steady.

The duties of peers of the realm. Should a judge in the most subordinate jurisdiction be deficient in the knowledge of the law, it would reflect infinite contempt upon himself, and disgrace upon those who employ them. And yet the consequence of his ignorance is comparatively very trifling and small: his judgment may be examined, and his errors rectified, by other courts. But how much more serious and affecting is the case of a superior judge, if without any skill in the laws he will boldly [12] venture to decide a question, upon which the welfare and subsistence of whole families may depend! where the chance of his judging right or wrong, is barely equal; and where, if he chances to judge wrong, he does an injury of the most alarming nature, an injury without possibility of redress!

Yet, vast as this trust is, it can no where be so properly reposed, as in the noble hands where our excellent constitution has placed it: and therefore placed it, because, from the independence of their fortune and the dignity of their station, they are presumed to employ that leisure which is the consequence of both, in attaining a more extensive knowledge of the laws than persons of inferior rank: and because the founders of our polity relied upon that delicacy of sentiment, so peculiar to noble birth: which, as on the one hand it will prevent either interest or affection from interfering in questions of right, so on the other it will bind a peer in honour, an obligation which the law esteems equal to another's oath, to be master of those points upon which it is his birthright to decide.

Mode in which the judical business of the house of lords is now conducted.

Such at any rate, according to Blackstone, is the theory of the constitution. It is however, necessary to observe, that it is not now the practice of the whole body of the house to attend to its judicial business. This is usually transacted entirely by the lord chancellor, speakers, or other peers, who have at one time filled judicial situations. The important duty of presiding over the judicial business of the house has even been entrusted to a learned person, not one of its members.[g] The attendance of three other lay peers during these sessions of the house, is a matter of form settled by rotation. The appellate jurisdiction of the house of lords must however be admitted to be in an unsettled and unsatisfactory state, and thus fully illustrates the justice of the foregoing strictures, and calls for alteration.

The Roman pandects will furnish us with a piece of history not unapplicable to our present purpose. Servius Sulpicius, a gentleman of the patrician order, and a celebrated orator, had occasion to take the opinion of Quintus Mutius Scaevola, the then oracle of the Roman law; but, for want of some knowledge in that science, could not so much as understand even the technical terms, which his friend was obliged to make use of. Upon which Mutius Scaevola could not forbear to upbraid him with this memorable reproof[h], "that it was a shame for a patrician, a nobleman, and an "orator of causes, to be ignorant of that law in which he

[g] For example, Sir W. Alexander, C. B., Sir John Leach, M. R., were appointed Deputy Speakers of the House of Lords, in the years 1826 and 1827.

[h] Ff. 1. 2. 2. §. 43. *Turpe esse patricio, et nobili, et causas oranti, jus in quo versaretur ignorare.*

"was so peculiarly concerned." This reproach made so deep an impression on Sulpicius, that he immediately applied himself to the study of the law; wherein he arrived [13] to that proficiency, that he left behind him about an hundred and fourscore volumes of his own compiling upon the subject; and became, in the opinion of Cicero[1], a much more complete lawyer than even Mutius Scaevola himself.

I would not be thought to recommend to our English nobility and gentry, to become as great lawyers as Sulpicius; though he together with this character, sustained likewise that of an excellent orator, a firm patriot, and a wise indefatigable senator: but the inference which arises from the story is this, that ignorance of the laws of the land hath ever been esteemed dishonourable in those, who are entrusted by their country to maintain, to administer, and to amend them.

But surely there is little occasion to enforce this argument any farther to persons of rank and distinction, if we remember the number of persons of noble origin who have become famous for their legal knowledge: happy, that while we lay down the rule, we can also produce the example. Although the profession of the law has constantly received new blood and vigour from those who have fought their way up even from the lowest rank of the community, yet it should not be forgotten that its study has been also pursued with the most unwearied application, and the most distinguished success, by those of the noblest birth and of ample patrimony: some of whom are still the ornaments of the profession; and others in their different spheres continue to do honour to its institutions, by assisting the administration of justice in their neighbourhoods, or exerting their senatorial abilities in the councils of the nation at home.

Legal knowledge also useful to the clergy.

Nor will some degree of legal knowledge be found in the least superfluous to persons of inferior rank: especially those of the learned professions. The clergy in particular, besides the common obligations they are under in proportion to their rank and fortune, have also abundant reason, considered [14] merely as clergymen, to be acquainted with many branches of the law, which are almost peculiar and appropriated to themselves alone. Such are the laws relating to advowsons, institutions, and inductions: to simony and simoniacal contracts: to uniformity, residence, and pluralities; to tithes and other ecclesiastical dues: although this has been much simplified by the recent act for their commutation;[j] to marriages (more especially of late) and to a variety of other subjects, which are consigned to the care of their order by the provisions of particular statutes. To understand these aright, to discern what is warranted or enjoined, and what is forbidden by law, demands a sort of legal apprehension: which is no otherwise to be acquired, than by use and a familiar acquaintance with legal writers.

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[1] Brut. 41.

To the faculty.

For the gentlemen of the faculty of physic, I must frankly own that I see no special reason why they in particular should apply themselves to the study of the law; unless in common with other gentlemen, and to complete the character of general and extensive knowledge; a character which their profession, beyond others, has remarkably deserved. They will give me leave however to suggest, and that not ludicrously, that it might frequently be of use to families upon sudden emergencies, if the physician were acquainted with the doctrine of last wills and testaments, at least so far as relates to the formal part of their execution, and it may be observed, that in all cases where the sanity of a testator may be doubted, they are the most satisfactory witnesses to the will.

To civilians.

But those gentlemen who intend to profess the civil and ecclesiastical laws, in the spiritual and maritime courts of this kingdom, are of all men (next to common lawyers) the most indispensably obliged to apply themselves seriously to the study of our municipal laws. For the civil and canon laws, considered with respect to any intrinsic obligation, have no force or authority in this kingdom; they are no more binding in England than our laws are binding at Rome. But as far as these foreign laws, on account of some peculiar propriety, have in some particular cases, and in some particular courts, been introduced and allowed by our laws, so far they oblige, and no farther; their authourity being wholly founded upon that permission and adoption. In which we are not singu- [15] lar in our notions: for even in Holland, where the imperial law is much cultivated and its decisions pretty generally followed, we are informed by Van Leeuwen,[k] that "it receives "its force from custom and the consent of the people, either "tacitly or expressly given: for otherwise, he adds, we "should no more be bound by this law, than by that of the "Almains, the Franks, the Saxons, the Goths, the Vandals, "and other of the ancient nations." Wherefore, in all points in which the different systems depart from each other, the law of the land takes place of the law of Rome, whether ancient or modern, imperial or pontifical. And, in those of our English courts wherein a reception has been allowed to the civil and canon laws, if either they exceed the bounds of that reception, by extending themselves to other matters than are permitted to them; or if such courts proceed according to the decisions of those laws, in cases wherein it is controlled by the law of the land, the common law in either instance both may, and frequently does, prohibit and annul their proceedings:[l] and it will not be a sufficient excuse for them to tell the king's courts at Westminster, that their practice is warranted by the laws of Justinian or Gregory, or is conformable to the decrees of the Rota or imperial chamber. For which reason it becomes highly necessary for every civilian and canonist, that would act with safety as a judge, or with prudence and reputation as an advocate, to know in what cases and how far the English laws have given sanction to the Roman; in what points the latter are rejected; and where they are both so intermixed and blended together as to form certain supplemental parts of the common law of England, distinguished by the titles of the king's maritime, the king's military, and the king's ecclesiastical law.

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[j] 6 & 7 Wm. 4, c. 71.

[16] From the general use and necessity of some acquaintance with the common law, the inference were extremely easy with regard to the propriety of some institutions, for promoting its study in places which gentlemen of all ranks and degrees resort, as the fountain of all useful knowledge. But how it

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[k] *Dedicatio corporis juris civilis. Edit.* 1663.

[l] Hale Hist. C. L. c. 2. Selden *in Fletam.* 5 Rep. Caudrey's case. 2 Inst. 599.

has come to pass that a design of this sort has never until lately taken place in the universities, and the reason why the study of our laws has in general fallen into disuse, I shall previously proceed to inquire.

How the study of the common law has declined.

Sir John Fortescue, in his panegyric on the laws of England, (which was written in the reign of Henry VI.) puts[m] a very obvious question in the mouth of the young prince, whom he is exhorting to apply himself to that branch of learning; "why the laws of England, being so good, so "fruitful, and so commodious, are not taught in the uni"versities, as the civil and canon laws are?" In answer to which he gives[n] what seems, with due deference be it spoken, a very jejune and unsatisfactory reason; being in short, that "as the proceedings at common law were in his "time carried on in three different tongues, the English, "the Latin, and the French, that science must be neces"sarily taught in those three several languages; but that "in the universities all sciences were taught in the Latin "tongue only;" and therefore he concludes, "that they "could not be conveniently taught or studied in our uni"versities." But without attempting to examine seriously the validity of this reason, (the very shadow of which by the wisdom of the late constitutions is entirely taken away,) we perhaps may find out a better, or at least a more plausible, account, why the study of the municipal laws has been banished from these seats of science, than what the learned chancellor thought it prudent to give to his royal pupil.

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The common law formerly taught in our universities, and by the clergy.

That ancient collection of unwritten maxims and customs, which is called the common law, however compounded or from whatever fountains derived, had subsisted immemorially in this kingdom; and, though somewhat altered and impaired by the violence of the times, had in great measure weathered the rude shock of the Norman conquest. This had endeared it to the people in general, as well because its decisions were universally known, as because it was found to be excellently adapted to the genius of the English nation. In the knowledge of this law consisted great part of the learning of those dark ages; it was then taught, says Mr. Selden,[o] in the monasteries, *in the universities*, and in the families of the principal nobility. The clergy in particular, as they then engrossed almost every other branch of learning, so (like their predecessors the British Druids)[p] they were peculiarly remarkable for their proficiency in the study of the law. *Nullus clericus nisi causidicus*, is the character given of them soon after the conquest by William of Malmsbury.[q] The judges therefore were usually created out of the sacred order,[r] as was likewise the case among the Normans;[s] and all the inferior offices were supplied by the lower clergy, which has occasioned their successors to be denominated *clerks* to this day.

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[m] c. 47.

[n] c. 48.

[o] *in Fletam.* 7. 7.

but on the discoveries of Justinian's pandects;

[18]

the civil law came into vogue;

But the common law of England, being not committed to writing, but only handed down by tradition, use, and experience, was not so heartily relished by the foreign clergy; who came over hither in shoals during the reign of the conqueror and his two sons, and were utter strangers to our constitution as well as our language. And an accident, which soon after happened, had nearly completed its ruin. A copy of Justinian's pandects, being newly[t] discovered at Amalfi, soon brought the civil law into vogue all over the west of Europe, where before it was quite laid aside,[u] and in a manner forgotten; though some traces of its authority remained in Italy[v] and the eastern provinces of the empire.[w] This now became in a particular manner the favourite of the popish clergy, who borrowed the method and many of the maxims of their canon law from this original. The study of it was introduced into several universities abroad, particularly that of Bologna; where exercises were performed, lectures read, and degrees conferred in this faculty, as in other branches of science: and many nations on the continent, just then beginning to recover from the convulsions consequent upon the overthrow of the Roman empire, and settling by degrees into peaceable forms of government, adopted the civil law, (being the best written system then extant) as the basis of their several constitutions; blending and interweaving it among their own feodal customs, in some places with a more extensive, in others a more confined authority.[x]

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[p] Caesar *de bello Gal.* 6. 12.

[q] *de gest. reg. l.* 4.

[r] Dugdale *Orig. jurid. c.* 8.

[s] *Les juges sont sages personnes et autentiques,—sicome les archevesques, evesques, les chanoines des eglises cathedraulx, et les autres personnes qui ont dignitez in saincte eglise; les abbez, les prieurs conventaulx, et les gouverneurs des eglises, &c. Grand Coustumier, ch.* 9.

[t] *circ. A. D.* 1130.

[u] LL. Wisigoth. 2. 1. 9.

[v] *Capitular Hludov. Pli.* 4. 102.

[w] Selden *in Fletam.* 5. 5.

and was introduced into England and partially adopted.

Nor was it long before the prevailing mode of the times reached England. For Theobald, a Norman abbot, being elected to the see of Canterbury,[y] and extremely addicted to this new study, brought over with him in his retinue many learned proficients therein; and among the rest Roger, sirnamed Vacarius, whom he placed in the university of Oxford,[z] to teach it to the people of this country. But it did not meet with the same easy reception in England, where a mild and rational system of laws had been long established, as it did upon the continent; and, though the monkish clergy (devoted to the will of a foreign primate) received it with eagerness and zeal, yet the laity, who were more interested to preserve the old constitution, and had already severely felt the effect of many Norman innovations, continued wedded to the use of the common law. King Stephen immediately published a proclamation,[a] forbidding the study of the laws, [19] then newly imported from Italy; which was treated by the monks[b] as a piece of impiety, and, though it might prevent the introduction of the civil law process into our courts of justice, yet did not hinder the clergy from reading and teaching it in their own schools and monasteries.

Conflict between the civil and the common law.

From this time the nation seems to have been divided into two parties; the bishops and clergy, many of them foreigners, who applied themselves wholly to the study of the civil and canon laws, which now came to be inseparably interwoven with each other; and the nobility and laity, who adhered with equal pertinacity to the old common law: both of them reciprocally jealous of what they were unacquainted with, and neither of them perhaps allowing the opposite

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[x] Domat's treatise of law, c. 13. § 9. *Epistol. Innocent. IV. in M. Paris ad A. D* 1254.

[y] *A. D.* 1138.

[z] Gervas. Dorobern. *Act. Pontif. Cantuar. col.* 1665.

[a] Rog. Bacon *citat.* per Selden in Fletam, 7, 6. in Fortesc. 33, and 8 Rep. Pref.

[b] Joan. Sarisburiens. Polycrat. 8, 22.

system that real merit which is abundantly to be found in each. This appears, on the one hand, from the spleen with which the monastic writers[c] speak of our municipal laws upon all occasions; and, on the other, from the firm temper which the nobility shewed at the famous parliament of Merton: when the prelates endeavoured to procure an act, to declare all bastards legitimate in case the parents intermarried at any time afterwards; alleging this only reason, because holy church (that is, the canon law) declared such children legitimate: but "all the earls and barons (says the parliament roll[d]) "with one voice answered, that they would not "change the laws of England, which had hitherto been used "and approved." And we find the same jealousy prevailing above a century afterwards,[e] when the nobility declared with a kind of prophetic spirit, "that the realm of England hath "never been unto this hour, neither by the consent of our "lord the king and the lords of parliament shall it ever be
[20] "ruled or governed by the civil law."[f] And of this temper between the clergy and laity many more instances might be given.

The clergy adhere to the civil law;

While things were in this situation, the clergy, finding it impossible to root out the municipal law, began to withdraw themselves by degrees from the temporal courts: and to that end, very early in the reign of king Henry III. episcopal constitutions were published,[g] forbidding all ecclesiastics to appear as advocates *in foro sæculari:* nor did they long continue to act as judges there, nor caring to take the oath of office which was then found necessary to be administered, that they should in all things determine according to the law and custom of this realm,[h] though they still kept possession of the high office of chancellor, an office then of little juridical power; and afterwards, as its business increased by degrees, they modelled the process of the court at their own discretion.

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[c] *Idem. Ibid.* 5, 16. Polydor. Virgil, Hist. l. 9.

[d] Stat. Merton. 20 Hen. III. c. 9. *Et omnes comites et barones una voce responderunt, quod nolunt leges Angliae mutare, quae bucusque usitatae sunt ed approbatae.*

[e] 11 Ric. II.

[f] Selden, Jan. Anglor. l. 2, s. 43, in Fortesc. c. 33.

[g] Spelman, Concil. A.D. 217. Wilkins, vol. i. *p.* 574. 599.

[h] Selden *in Fletam.* 9, 3.

and introduce it into the courts influenced by them;

But wherever they retired and wherever their authority extended, they carried with them the same zeal to introduce the rules of the civil, in exclusion of the municipal law. This appears in a particular manner from the spiritual courts of all denominations, from the chancellor's courts in both our universities, and from the high court of chancery before-mentioned; in all of which the proceedings are to this day in a course much conformed to the civil law: for which no tolerable reason can be assigned, unless that these courts were all under the immediate direction of the popish ecclesiastics, among whom it was a point of religion to exclude the municipal law; pope Innocent the fourth having forbidden[i] the very reading of it by the clergy, because its decisions were not founded on the imperial constitutions, but merely on the customs of the laity. And if it be considered, that our universities began about that period to receive their present form of scholastic discipline; that they were then, and continued to be till the time of the Reformation, entirely under the influence of the popish clergy; (Sir John Mason the first protestant, being also the first lay, chancellor of Oxford) this will lead us to perceive the reason, why the study of the Roman laws was in those days of bigotry[k] pursued with such alacrity in these seats of learning; and why the common law was entirely despised, and esteemed little better than heretical.

and into the universities.

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The common law thus ceased to become a part of academical education.

And, since the Reformation, many causes have conspired to

[i] M. Paris *ad A. D.* 1254.

[k] There cannot be a stronger instance of the absurd and superstitious veneration that was paid to these laws, than that the most learned writers of the times thought they could not form a perfect character, even of the blessed virgin, without making her a civilian and a canonist. Which Albertus Magnus, the renowned dominican doctor of the thirteenth century, thus proves in his *Summa de laudibus christiferae virginis (divinum magis quam humanum opus)* qu. 23, s. 5, "*Item quod jura civilis, et leges, et decreta scivit in summo, probatur hoc modo: sapientia advocati manifestatur in tribus; unum, quod obtineat omnia contra judicem justum et sapientem; secundo, quod contra adversarium astutum et sagacem; tertio, quod in causa desperata: sed beatissima virgo, contra judicem sapientissimum, Dominum; contra adversarium callidissimum, dyabolum; in causa nostra desperata; sententiam optatum obtinuit.*" To which an eminent franciscan, two centuries afterwards, Bernardinus de Busti (*Mariale, part* 4, *serm.* 9.) very gravely subjoins this note. "*Nec videtur incongruum mulieres habere peritiam juris. Legitur enim de uxore Joannis Andreae glossotoris, quod tantum peritiam in utroque jure habuit, ut publice in scholis legere ausa sit.*"

prevent its becoming a part of academical education. As, first, long usage and established custom; which, as in every thing else, so especially in the forms of scholastic exercise, have justly great weight and authority. Secondly, the real intrinsic merit of the civil law, considered upon the footing of reason and not of obligation, which was well known to the instructors of our youth; and their total ignorance of the merit of the common law, though its equal at least, and perhaps an improvement on the other. But the principal reason of all, that has hindered the introduction of this branch of learning, is, that the study of the common law, being banished from the universities in the times of popery, has fallen into a quite different channel, and has hitherto been wholly cultivated in another place. But as the long usage and established custom, of ignorance of the laws of the land, begin now to be thought unreasonable; and as by [22] these means the merit of those laws will probably be more generally known; we may hope that the method of studying them will soon revert to its ancient course, and the foundations at least of that science will be laid in the universites; without being exclusively confined to the channel which it fell into at the times I have just been describing.

The laity abide by the common law;

For, being then entirely abandoned by the clergy, a few stragglers excepted, the study and practice of it devolved of course into the hands of laymen: who entertained upon their parts a most hearty aversion to the civil law,[l] and made no scruple to profess their contempt, nay even their ignorance[m] of it, in the most public manner. But still, as the balance of learning was greatly on the side of the clergy, and as the common law was no longer *taught*, as formerly, in any part of the kingdom, it must have been subjected to many inconveniences, and perhaps would have been gradually lost and overrun by the civil, (a suspicion well justified from the frequent transcripts of Justinian to be met with in Bracton and Fleta) had it not been for a peculiar incident, which happened at a very critical time, and contributed greatly to its support.

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[l] Fortesc. *de laud. LL.* c. 25.

[m] This remarkably appeared in the case of the abbot of Torun. *M.* 22 *Edw.* III. 24, who had caused a certain prior to be summoned to answer at Avignon for erecting an oratory *contra inhibitionem novi operis;* by which words Mr. Selden (*in Flet.* 8, 5) very justly understands to be meant the title *de novi operis nuntiatione* both in the civil and canon laws, (*Ff.* 39, 1, *C.* 8, 11, and *Decretal*, not *Extrav.* 5, 32,) whereby the erection of any new buildings in prejudice of more ancient ones was prohibited. But Skipwith, the king's serjeant, and afterwards chief baron of the exchequer, declares them to be flat nonsense; "*in ceux parolx*, contra inhibitionem "novi operis, *ny ad pas entendment:*" and justice Schardelow mends the matter but little by informing him, that they signify a restitution *in their law:* for which reason he very sagely resolves to pay no sort of regard to them. "*Ceo n'est que un restitution* "*en lour ley, pur que a ceo n'avomus* "*regard, &c.*"

which was greatly assisted by the establishment of the court of common pleas at Westminster;

The incident which I mean was the fixing the court of common pleas, the grand tribunal for disputes of property, to be held in one certain spot; that the seat of ordinary justice might be permanent and notorious to all the nation. Formerly that, in conjunction with all the other superior courts, was held before the king's capital justiciary of England, in the *aula regis*, or such of his palaces wherein his royal person resided; and removed with his household from one end of the kingdom to the other. This was found to occasion great inconvenience to the suitors; to remedy which it was made an article of the great charter of liberties, both that of king John and king Henry the third,[m] that "common pleas should no longer follow the king's court, "but be held in some certain place:" in consequence of which they have ever since been held (a few necessary removals in times of the plague excepted) in the palace of Westminster only. This brought together the professors of the municipal law, who before were dispersed about the kingdom, and formed them into an aggregate body; whereby a society was established of persons, who, (as Spelman[n] observes) addicting themselves wholly to the study of the laws of the land, and no longer considering it as a mere subordinate science for the amusement of leisure hours, soon raised those laws to that pitch of perfection, which they suddenly attained under the auspices of our English Justinian, king Edward the first.

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and thus a body of professors was formed for the study of the common law;

who established the inns of court and chancery.

In consequence of this lucky assemblage, they naturally fell into a kind of collegiate order, and, being excluded from Oxford and Cambridge, found it necessary to establish a new university of their own. This they did by purchasing at various times certain houses (now called the inns of court and of Chancery) between the city of Westminster, the place of holding the king's courts, and the city of London; for advantage of ready access to the one, and plenty of provisions in the other.[o] Here exercises were performed, lectures read, and degrees were at length conferred in the common law, as at other universities in the canon and civil. The degrees were those of barristers (first styled apprentices[p] from *apprendre*, [24] to learn) who answered to the bachelors degrees conferred at the universities: as the state and degree of a serjeant,[q] *servientis ad legem*, did to that of doctor.

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[m] c. 11.

[n] Glossar. 334.

which was protected by the crown.

The crown seems to have soon taken under it's protection this infant seminary of common law; and, the more effectually to foster and cherish it, king Henry the third in the nineteenth year of his reign issued out an order directed to the mayor and sheriffs of London, commanding that no regent of any law schools *within* that city should for the future teach law therein.[r] The word, law, or *leges*, being a general term, may create some doubt at this distance of time whether the teaching of the civil law, or the common, or both, is hereby restrained. But in either case it tends to the same end. If the civil law only is prohibited, (which is Mr. Selden's[s] opinion) it is then a retaliation upon the clergy, who had excluded the common law from *their* seats of learning. If the municipal law be also included in the restriction, (as Sir Edward Coke[t] understands it, and which the words seem to import) then the intention is evidently this; by preventing private teachers within the walls of the city to collect all the common lawyers into the one public university, which was newly instituted in the suburbs. [25]

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[o] Fortesc. c. 48.

[p] Apprentices or barristers seem to have been first appointed by an ordinance of king Edward the first in parliament, in the 20th year of his reign. (Spelm. *Gloss.* 37. Dugdale, *Orig. jurid.* 55.)

Serjeants: their peculiar privilege abolished;

[q] The first mention which I have met with in our law-books of serjeants or countors, is in the statute of Westm. 1, 3 Edw. I. c. 29, and in Horn's Mirror, c. 1, s. 10, c. 2, s. 5, c. 3, s. 1, in the same reign. But M. Paris, in his life of John II, abbot of St. Alban's, which he wrote in 1255, 39 Hen. III. speaks of advocates at the common law, or countors, (*quo sbanci narratores vulgariter appellamus*) as of an order of men well known. And we have an example of the antiquity of the coif in the same author's history of England, A. D. 1259, in the case of one William de Bussy; who, being called to account for his great knavery and malpractices, claimed the benefit of his orders or clergy, which till then remained an entire secret; and to that, end *voluit ligamenta coifae suae solvere, ut palam monstraret se tonsuram habere clericalem; sed non est permissus.*—— *Satelles vero cum arripiens, non per coifae ligamina sed per guttur eum apprehendens, traxit ad carcerem.* And hence Sir H. Spelman conjectures, (*Glossar.* 335.) that coifs were introduced to hide the tonsure of such renegade clerks, as were still tempted to remain in the secular courts in the quality of advocates or judges, notwithstanding their prohibition by canon. The order of serjeants having long exercised a monopoly in the Court of Common Pleas was deprived of this advantage by a royal warrant, dated April 25, 1834, since which time no serjeant has been created, except as a matter of form, on promotion to the bench.

[r] *Ne aliquis scholas regens de legibus in eadem civitate de cuetero ibidem leges doceat.*

and formerly divided into inns of court and inns of chancery.

In this juridical university (for such it is insisted to have been by Fortescue[u] and Sir Edward Coke)[x] there were two sorts of collegiate houses: one called inns of chancery, in which the younger students of the law were usually placed, "learning and studying, says Fortescue,[y] the originals and as "it were the elements of the law; who, profiting therein, as "they grew to ripeness so were they admitted into the greater "inns of the same study, called the inns of court." And in these inns of both kinds, he goes on to tell us, the knights and barons, with other grandees and noblemen of the realm did use to place their children, though they did not desire to have them thoroughly learned in the law, or to get their living by it's practice: and that in his time there were about two thousand students at these several inns, all of whom he informs us were *filii nobilium*, or gentlemen born.

In Fortescue's time there were 2,000 students.

Hence, it is evident, that (though under the influence of the monks our universities neglected this study, yet) in the time of Henry the sixth it was thought highly necessary and was the universal practice, for the young nobility and gentry to be instructed in the originals and elements of the laws. But by degrees this custom has fallen into disuse; so that in the reign of queen Elizabeth Sir Edward Coke[z] does not reckon above a thousand students, and the number at present is perhaps not greater. Which seems principally owing to these reasons; first, because the inns of chancery,

In time of Eliz. 1,000 only;

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[s] *in Flet.* 8, 2.

[t] 2 Inst. proëm.

[u] c. 49.

[x] 3 Rep. Pref.

[y] *Ibid.*

[z] *Ibid.*

being now almost totally filled by the inferior branch of the profession, are neither commodious nor proper for the resort of gentlemen of any rank or figure: so that there are very rarely any young students entered at the inns of chancery; secondly, because in the inns of court all sorts of regimen and academical superintendence, either with regard to morals or studies, are found impracticable and therefore entirely neglected: lastly, because persons of birth and fortune, after having finished their usual courses at the universities, have seldom leisure or resolution sufficient to enter upon a new scheme of study at a new place of instruction. Wherefore few gentlemen now resort to the inns of court, but such for whom the knowledge of practice is absolutely necessary; such, I mean, as are intended for the profession: the rest of our gentry, (not to say our nobility also) having usually retired to their estates, or visited foreign kingdoms, or entered upon public life, without any instruction in the laws of the land, and indeed with hardly any opportunity of gaining instruction, unless it can be afforded them in the universities. The inns of court are the Inner Temple, Middle Temple, Lincoln's Inn, and Gray's Inn, from which societies alone students are called to the bar. The inns of chancery are Clifford's Inn, Clements Inn, Lyon's Inn, New Inn, Furnival's Inn, Thavie's Inn, Staple's Inn, and Barnard's Inn. These are subordinate to the inns of court, the three first belong to the Inner Temple, the fourth to the Middle Temple, the two next to Lincoln's Inn, and the two last to Gray's Inn. Admission to the inns of chancery with an intention of being called to the bar is now of no avail, with regard to the time and attendance required by the inns of court.[a]

but the inns of chancery are now not much resorted to;

[26]

and few will join the inns of court but such as are intended for the profession.

The inns of court and chancery.

[30]

Advantages likely to accrue from attention to law at universities.

The advantages that might result to the science of the law itself, when a little more attended to in the universities perhaps, would be very considerable. The leisure and abilities of the learned in these retirements might either suggest expedients, or execute those dictated by wiser heads,[b] for improving it's method, retrenching it's superfluities, and reconciling the little contrarieties, which the practice of many centuries will necessarily create in any human system: a task, which those, who are deeply employed in business and the more active scenes in the profession, can hardly condescend to engage in. And as to the interest, or (which is the same) the reputation of the universities themselves, I may venture to pronounce, that if ever this study should arrive to any tolerable perfection either at Oxford or Cambridge, the noblity and gentry of this kingdom would not shorten their residence upon this account, nor perhaps entertain a worse opinion of the benefits of academical education.

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[a] Mr. Christian's note.

[b] See Lord Bacon's proposals and offer of a digest.

Law lectures now delivered.

Hitherto, however, the study of the law at our universities has not been cultivated with much success, even where facilities have been afforded to it. In 1758 a professorship of law was founded under the will of Mr. Viner, and Blackstone, as is known to all, was the first Vinerian professor. The professorship, however, although commenced under such brilliant auspices, has, according to Mr. Christian, long sunk into the inglorious duty of receiving the stipend. Within the last few years some additional facilities for the study of the law have been afforded in the metropolis. Two professorships of law have been established; the one at King's College, the other at the London University, where courses of lectures on various branches of the law are delivered. Law lectures are also regularly given at the Law Society. Lectures were also recently instituted by the Society of the Inner Temple, for the benefit of its students. They have, however, been discontinued; but it is to be regretted that as well at this as the other inns of court lectures on the various branches of the law should not be regularly delivered by competent persons. Among other advantages a practice of this kind would tend much to settle and improve the law, more indeed than a similar institution at the universities.

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Advantages of a university education previous to commencing the study of the law.

But I think it past dispute that those gentlemen, who resort to the inns of court with a view to pursue the profession, will find it expedient (whenever it is practicable) to lay the previous foundations of this, as well as every other science, in one of our learned universities. We may appeal to the experience of every sensible lawyer, whether any thing can be more hazardous or discouraging than the usual entrance on the study of the law. A raw and unexperienced youth, in the most dangerous season of life, is transplanted on a sudden into the midst of allurements to pleasure, without any restraint or check but what his own prudence can suggest; with no public direction in what course to pursue his inquiries; no private assistance to remove the distresses and difficulties which will always embarrass a beginner. In this situation he is expected to sequester himself from the world, and by a tedious lonely process to extract the theory of law from a mass of undigested learning; or else by an assiduous attendance on the courts to pick up theory and practice together, sufficient to qualify him for the ordinary run of business. How little therefore is it to be wondered at, that we hear of so frequent miscarriages; that so many gentlemen of bright imaginations grow weary of so unpromising a search,[b] and addict themselves wholly to amusements, or other less innocent pursuits; and that so many persons of moderate capacity confuse themselves at first setting out, and continue ever dark and puzzled during the remainder of their lives.

[32]

Disadvantages of immediate commencement of practical part of the law.

The evident want of some assistance in the rudiments of legal knowledge has given birth to a practice, which, if ever it had grown to be general, must have proved of extremely pernicious consequence. I mean the custom by some so very warmly recommended, of dropping all liberal education, as of no use to students in the law: and placing them, in its stead, at the desk of some skilful attorney; in order to initiate them early in all the depths of practice, and render them more dextrous in the mechanical part of business. A few instances of particular persons, (men of excellent learning, and unblemished integrity,) who, in spite of this method of education, have shone in the foremost ranks of the bar, have afforded some kind of sanction to this illiberal path to the profession, and biassed many parents, of short-sighted judgment, in its favour: not considering, that there are some geniuses, formed to overcome all disadvantages, and that from such particular instances no general rules can be formed; nor observing, that those very persons have frequently recommended by the most forcible of all examples, the disposal of their own offspring, a very different foundation of legal studies, a regular academical education. Perhaps too, in return, I could direct their eyes to our principal seats of justice, and suggest a few hints in favour of university learning[c]:—nor need I select this particular time as alone favourable to this view.

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[b] Sir Henry Spelman, in the preface to his glossary, has given us a very lively picture of his own distress upon this occasion. "*Emisit me mater Londinum, juris nostri capessendi grotia; cujus cum vestibulum salutassem, reperissemque linguam peregrinam, dialectum barbarum, methodum incontinnam, molem non ingentem solum sed perpetuis humeris sustinendam, excidit mihi fateor animus, &c.*"

Making therefore due allowance for one or two shining exceptions, experience may teach us to foretell that a lawyer thus educated to the bar, in subservience to attorneys and solicitors,[d] will find he has begun at the wrong end. If practice be the whole he is taught, practice must also be the whole he will ever know: if he be uninstructed in the elements and first principles upon which the rule of practice is founded, the least variation from established precedents will totally distract and bewilder him: *ita lex scripta est*[e] is the utmost his knowledge will arrive at; he must never aspire to form, and seldom expect to comprehend, any arguments drawn *a priori*, from the spirit of the laws and the natural foundations of justice.

[33] Nor is this all; for (as few persons of birth, or fortune, or even of scholastic education, will submit to the drudgery of servitude and the manual labour of copying the trash of an office) should this infatuation prevail to any considerable degree, we must rarely expect to see a gentleman of dis-

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[c] The four highest judicial offices were, in 1758, at the time that Blackstone wrote this essay, filled by gentlemen, two of whom had been fellows of All Souls college; another, student of Christ church; and the fourth a fellow of Trinity college, Cambridge. The state of the bench at the present time is almost equally favourable to a university education. The present Chief Justice of the Court of Common Pleas, the Master of the Rolls, and the Vice Chancellor, not to mention others, are distinguished members of the English universities. It is, however, in fairness, to be observed, that all of these offices have very recently been held by persons who never had the advantage of this kind of education.

[d] See Kennet's Life of Somner, p. 67.

[e] *Ff.* 40, 9, 12.

tinction or learning at the bar. And what the consequence may be, to have the interpretation and enforcement of the laws (which include the entire disposal of our properties, liberties, and lives) fall wholly into the hands of obscure or illiterate men, is matter of very public concern.

Advantages which a student of law will derive from previous academical education.

The inconveniences here pointed out can never be effectually prevented, but by making academical education a previous step to the profession of the common law, and at the same time making the rudiments of the law a part of academical education. For sciences are of a sociable disposition, and flourish best in the neighbourhood of each other: nor is there any branch of learning but may be helped and improved by assistances drawn from other arts. If, therefore, the student in our laws hath formed both his sentiments and style, by perusal and imitation of the purest classical writers, among whom the historians and orators will best deserve his regard; if he can reason with precision, and separate argument from fallacy, by the clear simple rules of pure unsophisticated logic; if he can fix his attention, and steadily pursue truth through any the most intricate deduction, by the use of mathematical demonstrations: if he has enlarged his conceptions of nature and art, by a view of the several branches of genuine, experimental philosophy; if he has impressed on his mind the sound maxims of the law of nature, the best and most authentic foundation of human laws; if, lastly, he has contemplated those maxims reduced to a practical system in the laws of imperial Rome; if he has done this or any part of it, (though all may be easily done under as able instructors as ever graced any seats of learning) a student thus qualified may enter upon the study of the law with incredible advantage and reputation. And if, at the [34] conclusion, or during the acquisition of these accomplishments, he will afford himself a year or two's farther leisure, to lay the foundation of his future labours in a solid scientifical method, without thirsting too early to attend that practice which it is impossible he should rightly comprehend, he will afterwards proceed with the greatest ease, and will unfold the most intricate points with an intuitive rapidity and clearness.

I shall not insist upon such motives as might be drawn from principles of economy, and are applicable to particulars only: I reason upon more general topics. And therefore to the qualities of the head, which I have just enumerated, I cannot but add those of the heart; affectionate loyalty to the king, a zeal for liberty and the constitution, a sense of real honour, and well-grounded principles of religion; as necessary to form a truly valuable English lawyer, a Hyde, a Hale, or a Talbot. And, whatever the ignorance of some, or unkindness of others, may have heretofore untruly suggested, experience will warrant us to affirm, that these endowments of loyalty and public spirit, of honour and religion, are no where to be found in more high perfection than in the two universities of this kingdom.

Objects of the student.

[35] I may very briefly describe, rather what I conceive an academical expounder of the laws should do, than what I have ever known to be done. He should consider his course as a general map of the law, marking out the shape of the country, its connexions and boundaries, its greater divisions and principal cities; it is not his business to describe minutely the subordinate limits, or to fix the longitude and latitude of every inconsiderable hamlet. His attention should be engaged, like that of the readers in Fortescue's inns of chancery, "in tracing out the originals, and as it were the "elements of the law." For if, as Justinian[f] has observed, the tender understanding of the student be loaded at the first with a multitude and variety of matter, it will either occasion him to desert his studies, or will carry him heavily through them, with much labour, delay, and despondence. These originals should be traced to their fountains, as well as our distance will permit; to the customs of the Britons and Germans, as recorded by Cæsar and Tacitus; to the codes of the northern nations on the continent, and more especially to those of our own Saxon princes: to the rules

[f] *Incipientibus nobis exponere jura populi Romani, ita videntur tradi posse commodissime, si primo levi ac simplici via singula tradantur; alioqui, si statim ab initio rudem adhuc et infirmum animum studiosi multitudine ac varietate rerum oneravimus, duorum alterum, aut desertorem studiorum efficiemus, aut cum magno labore, saepe etiam cum diffidentia (quae plerumque juvenes avertit) serius ad id perducemus, ad quod, leviore via ductus, sine magno labore, et sine ulla diffidentia maturius perduci potuisset. Inst.* 1. 1, 2.

of the Roman law either left here in the days of Papinian, or [36] imported by Vacarius and his followers; but, above all, to that inexhaustible reservoir of legal antiquities and learning, the feodal law, or, as Spelman[g] has entitled it, the law of nations in our western orb. These primary rules and fundamental principles should be weighed and compared with the precepts of the law of nature, and the practice of other countries; should be explained by reasons, illustrated by examples, and confirmed by undoubted authorities; their history should be deduced, their changes and revolutions observed, and it should be shewn how far they are connected with, or have at any time been affected by, the civil transactions of the kingdom.

Requisite on the part of the student. A plan of this nature, if executed with care and ability, cannot fail of administering a most useful and rational entertainment to students of all ranks and professions; and yet it must be confessed that the study of the laws is not merely a matter of amusement; for, as a very judicious writer[h] has observed upon a similar occasion, the learner "will be considerably disappointed, if he looks for entertainment without the expence of attention." An attention, however, not greater than is usually bestowed in mastering the rudiments of other sciences, or sometimes in pursuing a favourite recreation or exercise. And this attention is not equally necessary to be exerted by every student upon every occasion. Some branches of the law, as the formal process of civil suits, and the subtile distinctions incident to landed property, which are the most difficult to be thoroughly understood, are the least worth the pains of understanding, except to such gentlemen as intend to pursue the profession. To others I may venture to apply, with a slight alteration, the words of Sir John Fortescue,[i] when first his royal pupil determines to engage in this study. "It will not be necessary for a gentleman, as such, to examine with a close application the critical niceties of the law. It will fully be sufficient, and he may well enough be denominated a lawyer, if under the instruction of a master he traces up the principles and

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[g] Of parliaments, 57.

[h] Dr. Taylor's pref. to Elem. of civil law.

[i] *De laud. Leg.* c. 8.

" grounds of the law, even to their original elements. There- [37]
" fore in a very short period, and with very little labour, he may
" be sufficiently informed in the laws of his country, if he will
" but apply his mind in good earnest to receive and appre-
" hend them. For, though such knowledge as is necessary
" for a judge is hardly to be acquired by the lucubrations of
" twenty years, yet, with a genius of tolerable perspicacity,
" that knowledge which is fit for a person of birth or con-
" dition may be learned in a single year, without neglecting
" his other improvements."

Chambers of counsel.

To those, however, who undertake the study of the law as a preparation for their profession, it need hardly be said that a much longer period must be necessary for learning it. A practice has sprung up since the time of Blackstone, which is now almost universal, and greatly facilitates the acquiring a knowledge of the practice of the law. I allude to the student placing himself in the chambers of a practising member of the profession, for the purpose of seeing the mode in which business is conducted. This will be of great assistance to the student, if preceded or accompanied by diligent study on his own part; but without this he will understand but little that he sees while there, and remember still less when he leaves them.

SECTION THE SECOND.

OF THE NATURE OF LAWS IN GENERAL.

[38] Law in its general sense.

Law, in its most general and comprehensive sense, signifies a rule of action; and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus we say, the laws of motion, of gravitation, of optics, or mechanics, as well as the laws of nature and of nations. And it is that rule of action, which is prescribed by some superior, and which the inferior is bound to obey.

Thus when the supreme being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter, from which it can never depart, and without which it would cease to be. When he put that matter into motion, he established certain laws of motion, to which all moveable bodies must conform. And, to descend from the greatest operations to the smallest, when a workman forms a clock, or other piece of mechanism, he establishes at his own pleasure certain arbitrary laws for its direction; as that the hand shall describe a given space in a given time; to which law as long as the work conforms, so long it continues in perfection, and answers the ends of its formation.

If we farther advance, from mere inactive matter to vegetable and animal life, we shall find them still governed by laws; more numerous indeed, but equally fixed and invariable. The whole progress of plants, from the seed to the root, and from thence to the seed again;—the method of
[39] animal nutrition, digestion, secretion, and of all other branches of vital economy;—are not left to chance, or the will of the creature itself, but are performed in a wondrous involuntary

manner, and guided by unerring rules laid down by the great creator.

This then is the general signification of law, a rule of action dictated by some superior being: and, in those creatures that have neither the power to think, nor to will, such laws must be invariably obeyed, so long as the creature itself subsists, for its existence depends on that obedience. But laws, in their more confined sense, and in which it is our present business to consider them, denote the rules, not of action in general, but of *human* action or conduct: that is, the precepts by which man, the noblest of all sublunary beings, a creature endowed with both reason and freewill, is commanded to make use of those faculties in the general regulation of his behaviour.

Law as the rule of human conduct.

Man, considered as a creature, must necessarily be subject to the laws of his creator, for he is entirely a dependent being. A being, independent of any other, has no rule to pursue, but such as he prescribes to himself; but a state of dependence will inevitably oblige the inferior to take the will of him, on whom he depends, as the rule of his conduct: not indeed in every particular, but in all those points wherein his dependence consists. This principle therefore has more or less extent and effect, in proportion as the superiority of the one and the dependence of the other is greater or less, absolute or limited. And consequently, as man depends absolutely upon his maker for everything, it is necessary that he should in all points conform to his maker's will.

The law of nature.

This will of his maker is called the law of nature. For as God, when he created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, when he created man, and endued him with freewill to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that freewill is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws. [40]

Considering the creator only as a being of infinite *power*, he was able unquestionably to have prescribed whatever laws he pleased to his creature, man, however unjust or severe. But as he is also a being of infinite *wisdom*, he has laid down only such laws as were founded in those relations of justice, that existed in the nature of things antecedent to any positive precept. These are the eternal, immutable laws of good and evil, to which the creator himself in all his dispensations conforms; and which he has enabled human reason to discover, so far as they are necessary for the conduct of human actions. Such among others are these principles: that we should live honestly, or as others render it uprightly, should hurt nobody, and should render to every one his due; to which three general precepts Justinian[a] has reduced the whole doctrine of law.

But if the discovery of these first principles of the law of nature depended only upon the due exertion of right reason, and could not otherwise be obtained than by a chain of metaphysical disquisitions, mankind would have wanted some inducement to have quickened their inquiries, and the greater part of the world would have rested content in mental indolence, and ignorance it's inseparable companion. As therefore the creator is a being, not only of infinite *power*, and *wisdom*, but also of infinite *goodness*, he has been pleased so to contrive the constitution and frame of humanity, that we should want no other prompter to inquire after and pursue the rule of right, but only our own self-love, that universal principle of action. For he has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be attained but by observing the former; and, if the former be punctually obeyed, it cannot but induce the latter. In consequence of which mutual connection of justice and human felicity, he [41] has not perplexed the law of nature with a multitude of abstracted rules and precepts, referring merely to the fitness or unfitness of things, as some have vainly surmised; but has graciously reduced the rule of obedience to this one paternal precept, "that man should pursue his own true and substan-"tial happiness." This is the foundation of what we call ethics, or natural law. For the several articles into which it is branched in our systems, amount to no more than demonstrating, that this or that action tends to man's real happiness, and therefore very justly concluding that the performance of it is a part of the law of nature; or, on the other hand, that this or that action is destructive of man's real happiness, and therefore that the law of nature forbids it.

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[a] *Juris praecepta sunt haec, honeste vivere, alterum non laedere, suum cuique tribuere.* *Inst.* 1, 1, 3.

Which is superior to any other

This law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times: no human laws are of any validity, if contrary to this:[1] and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.

But in order to apply this to the particular exigencies of each individual, it is still necessary to have recourse to reason: whose office it is to discover, as was before observed, what the law of nature directs in every circumstance of life; by considering, what method will tend the most effectually to our own substantial happiness. And if our reason were always, as in our first ancestor before his transgression, clear and perfect, unruffled by passions, unclouded by prejudice, unimpaired by disease or intemperance, the task would be pleasant and easy; we should need no other guide but this. But every man now finds the contrary in his own experience; that his reason is corrupt, and his understanding full of ignorance and error.

reason for the interference of a divine providence;

[42]

the revealed law.

This has given manifold occasion for the benign interposition of divine providence; which, in compassion to the frailty, the imperfection, and the blindness of human reason, hath been pleased, at sundry times and in divers manners, to discover and enforce its laws by an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures. These precepts, when revealed, are found upon comparison to be really a part of the original law of nature, as they tend in all their consequences to man's felicity. But we are not from thence to conclude that the knowledge of these truths was attainable by reason, in its present corrupted state; since we find that, until they were revealed, they were hid from the wisdom of ages. As then the moral precepts of this law are indeed of the same original with those of the law of nature, so their intrinsic obligation is of equal strength and perpetuity. Yet undoubtedly the revealed law is of infinitely more authenticity than that moral system, which is framed by ethical writers, and denominated the natural law. Because one is the law of nature, expressly declared so to be by God himself; the other is only what, by the assistance of human reason, we imagine to be that law. If we could be as certain of the latter as we are of the former, both would have an equal authority: but, till then, they can never be put in any competition together.

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[1] See further as to this, *post*, s. 3.

All human laws depend on the law of nature and the revealed law.

Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these. There are, it is true, a great number of indifferent points, in which both the divine law and the natural leave a man at his own liberty; but which are found necessary for the benefit of society to be restrained within certain limits. And herein it is that human laws have their greatest force and efficacy: for, with regard to such points as are not indifferent, human laws are only declaratory of, and act in subordination to, the former. To instance in the case of murder: this is expressly forbidden by the divine, and demonstrably by the natural law; and from these prohibitions arises the true unlawfulness of this crime. Those human laws that annex a punishment to it, do not at all increase it's moral guilt, or superadd any fresh obligation *in foro conscientiæ* to abstain [43] from it's perpetration. Nay, if any human law should allow or injoin us to commit it, we are bound to transgress that human law, or else we must offend both the natural and the divine. But with regard to matters that are in themselves indifferent, and are not commanded or forbidden by those superior laws; such, for instance, as exporting of wool into foreign countries;[1] here the inferior legislature has scope and opportunity to interpose, and to make that action unlawful which before was not so.

If man were to live in a state of nature, unconnected with other individuals, there would be no occasion for any other laws, than the law of nature and the law of God. Neither could any other law possibly exist: for a law always supposes some superior who is to make it; and in a state of nature we are all equal, without any other superior but him who is the author of our being. But man was formed for society; and, as is demonstrated by the writers on this subject,[m] is neither capable of living alone, nor indeed has the courage to do it. However, as it is impossible for the whole race of mankind to be united in one great society, they must necessarily divide into many; and form separate states, commonwealths, and nations, entirely independent of each other, and yet liable to a mutual intercourse. Hence arises a third kind of law, to regulate this mutual intercourse, called "the law of nations:" which, as none of these states will acknowledge a superiority in the other, cannot be dictated by any; but depends entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues, and agreements between these several communities: in the construction also of which compacts we have no other rule to resort to, but the law of nature; being the only one to which all the communities are equally subject: and therefore the civil law[n] very justly observes, that *quod naturalis ratio inter omnes homines constituit, vocatur jus gentium.*

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[1] See *post*, p. 49.

The law of nations.

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Thus much I thought it necessary to premise concerning the law of nature, the revealed law, and the law of nations, before I proceeded to treat more fully of the principal subject of this section, municipal or civil law; that is, the rule by which particular districts, communities, or nations are governed; being thus defined by Justinian,[o] "*jus civile est* "*quod quisque sibi populus constituit.*" I call it *municipal* law, in compliance with common speech; for, though strictly that expression denotes the particular customs of one single *municipium* or free town, yet it may with sufficient propriety be applied to any one state or nation, which is governed by the same laws and customs.

Municipal law;

Municipal law, thus understood, is properly defined to be "a rule of civil conduct prescribed by the supreme power "in a state, commanding what is right and prohibiting

definition of it.

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[m] Puffendorf, l. 7, c. 1, compared with Barbeyrac's commentary.

[n] Ff. 1, 1, 9.

[o] Inst. 1, 2, 1.

"what is wrong." Let us endeavour to explain its several properties, as they arise out of this definition.

It is a rule

And, first, it is a *rule:* not a transient sudden order from a superior, to or concerning a particular person; but something permanent, uniform, and universal. Therefore a particular act of the legislature to confiscate the goods of Titius, or to attaint him of high treason, does not enter into the idea of a municipal law: for the operation of this act is spent upon Titius only, and has no relation to the community in general; it is rather a sentence than a law. But an act to declare that the crime of which Titius is accused shall be deemed high treason; this has permanency, uniformity, and universality, and therefore is properly a *rule.* It is also called a *rule,* to distinguish it from *advice* or *counsel,* which we are at liberty to follow or not, as we see proper, and to judge upon the reasonableness or unreasonableness of the thing advised: whereas our obedience to the *law* depends not upon *our approbation,* but upon the *maker's will.* Counsel is only matter of persuasion, law is matter of injunction: counsel acts only upon the willing, law upon the unwilling also.

[45] It is also called a *rule,* to distinguish it from a *compact* or *agreement;* for a compact is a promise proceeding *from* us, law is a command directed *to* us. The language of a compact is, "I will, or will not, do this;" that of a law is, "thou shalt, or shalt not, do it." It is true there is an obligation which a compact carries with it, equal in point of conscience to that of a law; but then the original of the obligation is different. In compacts, we ourselves determine and promise what shall be done, before we are obliged to do it; in laws, we are obliged to act without ourselves determining or promising any thing at all. Upon these accounts law is defined to be "*a rule.*"

of civil conduct.

Municipal law is also "a rule *of civil conduct.*" This distinguishes municipal law from the natural, or revealed; the former of which is the rule of *moral* conduct, and the latter not only the rule of moral conduct, but also the rule of faith. These regard man as a creature, and point out his duty to God, to himself, and to his neighbour, considered in the light of an individual. But municipal or civil law regards him also as a citizen, and bound to other duties towards his neighbour than those of mere nature and religion: duties, which he has engaged in by enjoying the benefits of the common union; and which amount to no more, than that he do contribute, on his part, to the subsistence and peace of the society.

Prescribed

It is likewise "a rule *prescribed*." Because a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it. But the manner in which this notification is to be made, is matter of very great indifference. It may be notified by universal tradition and long practice, which supposes a previous publication, and is the case of the common law of England. It may be notified, *viva voce*, by officers appointed for that purpose, as is done with regard to proclamations, and such acts of parliament as are appointed to be publicly read in[p] churches and other assemblies. [46] It may lastly be notified by writing, printing, or the like; which is the general course taken with all our acts of parliament. Yet, whatever way is made use of, it is incumbent on the promulgators to do it in the most public and perspicuous manner; not like Caligula, who (according to Dio Cassius) wrote his laws in a very small character, and hung them upon high pillars, the more effectually to ensnare the people. There is still a more unreasonable method than this, which is called making of laws *ex post facto*; when after an action (indifferent in itself) is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust.[q] All laws

(*ex post facto* laws.)

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[p] See 1 Vict. c. 45.

[q] Such laws among the Romans were denominated *privilegia*, or private laws, of which Cicero (*de leg.* 3, 19, and in his oration *pro domo*, 17) thus speaks: "*Vetant leges sacratae,* "*vetant duodecim tabulae, leges pri-* "*vatis hominibus irrogari; id enim* "*est privilegium. Nemo unquam* "*tulit, nihil est crudelius, nihil per-* "*niciosus, nihil quod minus haec civi-* "*tas ferre possit.*"

should be therefore made to commence *in futuro*, and be notified before their commencement; which is implied in the term "*prescribed*."[r] But when this rule is in the usual manner notified, or prescribed, it is then the subject's business to be thoroughly acquainted therewith; for if ignorance, of what he *might* know, were admitted as a legitimate excuse, the laws would be of no effect, but might always be eluded with impunity.

By the supreme power of the state.

But farther: municipal law is "a rule of civil conduct prescribed *by the supreme power in a state*." For legislature, as was before observed, is the greatest act of superiority that can be exercised by one being over another. Wherefore it is requisite to the very essence of a law, that it be made by the supreme power. Sovereignty and legislature are indeed convertible terms; one cannot subsist without the other.

[47] This will naturally lead us into a short inquiry concerning the nature of society and civil government; and the natural, inherent right that belongs to the sovereignty of a state, wherever that sovereignty be lodged, of making and enforcing laws.

The foundations of society and the origin of government.

The only true and natural foundations of society are the wants and the fears of individuals. Not that we can believe, with some theoretical writers, that there ever was a time when there was no such thing as society, either natural or civil; and that, from the impulse of reason, and through a sense of their wants and weaknesses, individuals met together in a large plain, entered into an original contract, and chose the tallest man present to be their governor. This notion, of an actually existing unconnected state of nature, is too wild to be seriously admitted: and besides it is plainly contradictory to the revealed accounts of the primitive origin of mankind, and their preservation two thousand years afterwards; both which were effected by the means of single families. These formed the first natural society, among themselves, which, every day extending it's limits, laid the first though imperfect rudiments of civil or political society: and when it grew too large to subsist with convenience in that pastoral state wherein the patriarchs appear to have lived, it necessarily subdivided itself by various migrations into more. Afterwards, as agriculture increased, which employs and can maintain a much greater number of hands, migrations becames less frequent: and various tribes, which had formerly separated, reunited again; sometimes by compulsion and conquest, sometimes by accident, and sometimes perhaps by compact. But, though society had not it's formal beginning from any convention of individuals, actuated by their wants and their fears; yet it is the *sense* of their weakness and imperfection that *keeps* mankind together, that demonstrates the necessity of this union, and that therefore is the solid and natural foundation, as well as the cement, of civil society. And this is what we mean by the original contract of society; which, though perhaps in no instance it has ever been formally expressed at the first institution of a state, yet in nature and reason must always be understood and implied, in the very act of [48] associating together: namely, that the whole should protect all its parts, and that every part should pay obedience to the will of the whole; or, in other words, that the community should guard the rights of each individual member, and that (in return for this protection) each individual should submit to the laws of the community; without which submission of all it was impossible that protection could be certainly extended to any.

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[r] And thus it is enacted, by the 33 Geo. III. c. 13, that all acts of parliament in which a specific time for their coming into operation is not fixed, take effect from the day on which they receive the royal assent.

For when civil society is once formed, government at the same time results of course, as necessary to preserve and to keep that society in order. Unless some superior be constituted, whose commands and decisions all the members are bound to obey, they would still remain as in a state of nature, without any judge upon earth to define their several rights, and redress their several wrongs. But, as all the members which compose this society were naturally equal, it may be asked, in whose hands are the reigns of government to be entrusted? To this the general answer is easy; but the application of it to particular cases has occasioned one half of those mischiefs, which are apt to proceed from misguided political zeal. In general, all mankind will agree that government should be reposed in such persons, in whom

In whom government should be reposed.

those qualities are most likely to be found, the perfection of which is among the attributes of him who is emphatically styled the supreme being; the three grand requisites, I mean, of wisdom, of goodness, and of power: wisdom, to discern the real interest of the community; goodness, to endeavour always to pursue that real interest; and strength, or power, to carry this knowledge and intention into action. These are the natural foundations of sovereignty, and these are the requisites that ought to be found in every well-constituted frame of government.

How the several forms of government we now see in the world at first actually began, is matter of great uncertainty, and has occasioned infinite disputes. It is not my business or intention to enter into any of them. However they [49] began, or by what right soever they subsist, there is and must be in all of them a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside. And this authority is placed in those hands, wherein (according to the opinion of the founders of such respective states, either expressly given, or collected from their tacit approbation) the qualities requisite for supremacy, wisdom, goodness, and power, are the most likely to be found.

Three forms of government usually allowed to exist.

The political writers of antiquity will not allow more than three regular forms of government; the first, when the sovereign power is lodged in an aggregate assembly consisting of all the free members of a community, which is called a democracy; the second, when it is lodged in a council, composed of select members, and then it is styled an aristocracy; the last, when it is entrusted in the hands of a single person, and then it takes the name of a monarchy. All other species of government, they say, are either corruptions of, or reducible to, these three.

By the sovereign power, as was before observed, is meant the making of laws; for wherever that power resides, all others must conform to, and be directed by it, whatever appearance the outward form and administration of the government may put on. For it is at any time in the option of the legislature to alter that form and administration by a new edict or rule, and to put the execution of the laws into whatever hands it pleases; by constituting one, or a few, or many executive magistrates: and all the other powers of the state must obey the legislative power in the discharge of their several functions, or else the constitution is at an end.

1. Democracy.

2. Aristocracy.

[50]

3. Monarchy.

In a democracy, where the right of making laws resides in the people at large, public virtue, or goodness of intention, is more likely to be found, than either of the other qualities of government. Popular assemblies are frequently foolish in their contrivance, and weak in their execution; but generally mean to do the thing that is right and just, and have always a degree of patriotism or public spirit. In aristocracies there is more wisdom to be found, than in the other frames of government; being composed, or intended to be composed, of the most experienced citizens: but there is less honesty than in a republic, and less strength than in a monarchy. A monarchy is indeed the most powerful of any; for by the entire conjunction of the legislative and executive powers all the sinews of government are knit together, and united in the hand of the prince: but then there is imminent danger of his employing that strength to improvident or oppressive purposes.

Perfections and imperfections of these three.

Thus these three species of government have, all of them, their several perfections and imperfections. Democracies are usually the best calculated to direct the end of a law; aristocracies to invent the means by which that end shall be obtained; and monarchies to carry those means into execution. And the ancients, as was observed, had in general no idea of any other permanent form of government but these three: for though Cicero[s] declares himself of opinion, "*esse optime constitutam rempublicam, quæ ex* "*tribus generibus illis, regali, optimo, et populari, sit modice* "*confusa;*" yet Tacitus treats this notion of a mixed government, formed out of them all, and partaking of the advantages of each, as a visionary whim, and one that, if effected, could never be lasting or secure.[t]

The three united in the British constitution.

But, happily for us of this island, the British constitution

[s] In his fragments *de rep. l.* 2.

[t] "*Cunctas nationes et urbes populus aut primores, aut singuli regunt:* "*delecta ex his et constituta reipublicae forma laudari facilius quam* "*evenire, vel, si evenit, haud diuturna* "*esse potest.*" *Ann. l.* 4.

has long remained, and I trust will long continue, a standing exception to the truth of this observation. For, as with us, the executive power of the laws is lodged in a single person, they have all the advantages of strength and dispatch, that are to be found in the most absolute monarchy: and as the legislature of the kingdom is entrusted to three distinct powers, entirely independent of each other; first, the king; secondly, the lords spiritual and temporal, which is an aristocratical assembly of persons selected for their piety, [51] their birth, their wisdom, their valour, or their property; and, thirdly, the house of commons, freely chosen by the people from among themselves, which makes it a kind of democracy; as this aggregate body, actuated by different springs, and attentive to different interests, composes the British parliament, and has the supreme disposal of every thing; there can no inconvenience be attempted by either of the three branches, but will be withstood by one of the other two; each branch being armed with a negative power, sufficient to repel any innovation which it shall think inexpedient or dangerous.

Here then is lodged the sovereignty of the British constitution; and lodged as beneficially as is possible for society. For in no other shape could we be so certain of finding the three great qualities of government so well and so happily united. If the supreme power were lodged in any one of the three branches separately, we must be exposed to the inconveniences of either absolute monarchy, aristocracy, or democracy; and so want two of the three principal ingredients of good polity, either virtue, wisdom, or power. If it were lodged in any two of the branches; for instance, in the king and house of lords, our laws might be providently made, and well executed, but they might not have always the good of the people in view: if lodged in the king and commons, we should want that circumspection and mediatory caution, which the wisdom of the peers is to afford: if the supreme rights of legislature were lodged in the two houses only, and the king had no negative upon their proceedings, they might be tempted to incroach upon the royal prerogative, or perhaps to abolish the kingly office, and thereby weaken (if not totally destroy) the strength of

As to whether the three parts must have equal powers.

the executive power. But the constitutional government of this island is so admirably tempered and compounded, that, in the opinion of Blackstone,[u] nothing can endanger or hurt it, but destroying the equilibrium of power between one branch of the legislature and the rest. " For if ever it " should happen," he says, " that the independence of any " one of the three should be lost, or that it should become " subservient to the views of either of the other two, there " would soon be an end of our constitution. The legislature [52] " would be changed from that, which (upon the supposition " of an original contract, either actual or implied) is presumed to have been originally set up by the general con" sent and fundamental act of the society: and such a " change, however effected, is according to Mr. Locke[v] " (who perhaps carries his theory too far) at once an entire " dissolution of the bands of government; and the people " are thereby reduced to a state of anarchy, with liberty to " constitute to themselves a new legislative power."

However that this is the theory of the British constitution has been recently disputed by political writers of different and opposite parties, and although certainly plausible, it is not supported by historical facts. If it be true that there would be an end of the constitution, if at any time any one of the three should become subservient to the views of either of the other branches, then assuredly the constitution is at an end: for it would be difficult to contend, that in the times of Henry VIII. and Elizabeth the two houses of parliament were not subservient to the crown, or that before the Reform Act the house of lords had not the ascendancy, or that since that act the house of commons have not had it. Indeed, it seems difficult to name any eventful period of our constitutional history where the exact equilibrium of power referred to by Blackstone existed. That this supposed theory of our constitution is now denied by political writers of different parties, is at any rate indisputable.[w]

Having thus cursorily considered the three usual species of government, and our own singular constitution, selected and compounded from them all, I proceed to observe, that, as the power of making laws constitutes the supreme authority, so wherever the supreme authority in any state resides, it is the right of that authority to make laws; that is, in the words of our definition, *to prescribe the rule of civil action.* And this may be discovered from the very end and institution of civil states. For a state is a collective body, composed of a multitude of individuals, united for their safety and convenience, and intending to act together as one man. If it therefore is to act as one man, it ought to act by one uniform will. But, inasmuch as political communities are made up of many natural persons, each of whom has his particular will and inclination, these several wills cannot by any *natural* union be joined together, or tempered and disposed into a lasting harmony, so as to constitute and produce that one uniform will of the whole. It can therefore be no otherwise produced than by a *political* union; by the consent of all persons to submit their own private wills to the will of one man, or of one or more assemblies of men, to whom the supreme authority is entrusted: and this will of that one man, or assemblage of men, is in different states, according to their different constitutions, understood to be *law*.

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[u] This theory of the English constitution is enlarged on in the work of De Lolme.

[v] On government, part ii. §. 212.

[w] Compare Jeremy Bentham, *Book of Fallacies*, p. 248, Edit. 1824, with the *Quarterly Review*, Vol. 57, p. 231.

The right to make laws;

the duty to make laws,

Thus far as to the *right* of the supreme power to make laws; but farther, it is it's *duty* likewise. For since the [53] respective members are bound to conform themselves to the will of the state, it is expedient that they receive directions from the state declaratory of that it's will. But, as it is impossible, in so great a multitude, to give injunctions to every particular man, relative to each particular action, it is therefore incumbent on the state to establish general rules, for the perpetual information and direction of all persons in all points, whether of positive or negative duty. And this, in order that every man may know what to look upon as his own, what as another's; what absolute and what relative duties are required at his hands; what is to be esteemed honest, dishonest, or indifferent; what degree every man retains of his natural liberty; what he has given up as the price of the benefits of society; and after what manner each person is to moderate the use and exercise of those rights which the state assigns him, in order to promote and secure the public tranquillity.

Municipal law is a rule commanding what is right and prohibiting what is wrong.

From what has been advanced, the truth of the former branch of our definition is (I trust) sufficiently evident; that "*municipal law is a rule of civil conduct prescribed by the* "*supreme power in a state.*" I proceed now to the latter branch of it; that it is a rule so prescribed, "*commanding* "*what is right, and prohibiting what is wrong.*

Now in order to do this completely, it is first of all necessary that the boundaries of right and wrong be established and ascertained by law. And when this is once done, it will follow of course that it is likewise the business of the law, considered as a rule of civil conduct, to enforce these rights and to restrain or redress these wrongs. It remains therefore only to consider in what manner the law is said to accertain the boundaries of right and wrong; and the methods which it takes to command the one and prohibit the other.

Every law is declaratory.

For this purpose every law may be said to consist of several parts: one, *declaratory;* whereby the rights to be observed, and the wrongs to be eschewed, are clearly defined [54] and laid down: another, *directory;* whereby the subject is instructed and enjoined to observe those rights, and to abstain from the commission of those wrongs: a third, *remedial;* whereby a method is pointed out to recover a man's private rights, or redress his private wrongs: to which may be added a fourth, usually termed the *sanction,* or *vindicatory* branch of the law; whereby it is signified what evil or penalty shall be incurred by such as commit any public wrongs, and transgress or neglect their duty.

Directory.

Remedial.

Vindicatory.

Declaratory part.

With regard to the first of these, the *declaratory* part of the municipal law, this depends not so much upon the law of revelation or of nature, as upon the wisdom and will of the legislator. This doctrine, which before was slightly touched, deserves a more particular explication. Those rights then which God and nature have established, and are therefore called natural rights, such as are life and liberty, need not the aid of human laws to be more effectually invested in every man than they are; neither do they receive any additional strength when declared by the municipal laws to be inviolable. On the contrary, no human legislature has power to abridge or destroy them, unless the owner shall himself commit some act that amounts to a forfeiture. Neither do divine or natural *duties* (such as, for instance, the worship of God, the maintenance of children, and the like) receive any stronger sanction from being also declared to be duties by the law of the land. The case is the same as to crimes and misdemeanors, that are forbidden by the superior laws, and therefore styled *mala in se*, such as murder, theft, and perjury; which contract no additional turpitude from being declared unlawful by the inferior legislature. For that legislature in all these cases acts only, as was before observed, in subordination to the great lawgiver, transcribing and publishing his precepts. So that, upon the whole, the declaratory part of the municipal law has no force or operation at all, with regard to actions that are naturally and intrinsically right or wrong.

[55] But, with regard to things in themselves indifferent, the case is entirely altered. These become either right or wrong, just or unjust, duties or misdemeanors, according as the municipal legislature sees proper, for promoting the welfare of the society, and more effectually carrying on the purposes of civil life. Thus our own common law has declared, that the goods of the wife do instantly upon marriage become the property and right of the husband; and our statute law has declared all monopolies a public offence; yet that right, and this offence, have no foundation in nature; but are merely created by the law, for the purposes of civil society. And sometimes, where the thing itself has its rise from the law of nature, the particular circumstances and mode of doing it become right or wrong, as the laws of the land shall direct. Thus, for instance, in civil duties; obedience to superiors is the doctrine of revealed as well as natural religion: but who those superiors shall be, and in what circumstances or to what degree they shall be obeyed, it is the province of human laws to determine. And so, as to injuries or crimes, it must be left to our own legislature to decide, in what cases the seizing another's cattle shall amount to a trespass or a theft; and where it shall be a justifiable

action as when a landlord takes them by way of distress for rent.

The directory part.

Thus much for the *declaratory* part of the municipal law: and the *directory* stands much upon the same footing; for this virtually includes the former, the declaration being usually collected from the direction. The law that says, "thou "shalt not steal," implies a declaration that stealing is a crime. And we have seen[x] that, in things naturally indifferent, the very essence of right and wrong depends upon the direction of the laws to do or to omit them.

The remedial part.

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The *remedial* part of a law is so necessary a consequence of the former two, that laws must be very vague and imperfect without it. For in vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting those rights, when wrongfully withheld or invaded. This is what we mean properly, when we speak of the protection of the law. When, for instance, the *declaratory* part of the law has said, "that the field or inhe"ritance, which belonged to Titius's father, is vested by his "death in Titius;" and the *directory* part has "forbidden "any one to enter on another's property, without the leave "of the owner:" if Gaius after this will presume to take possession of the land, the *remedial* part of the law will then interpose its office; will make Gaius restore the possession to Titius, and also pay him damages for the invasion.

The vindicatory part.

With regard to the *sanction* of laws, or the evil that may attend the breach of public duties; it is observed, that human legislatures have for the most part chosen to make the sanction of their laws rather *vindicatory* than *remuneratory*, or to consist rather in punishments, than in actual particular rewards. Because, in the first place, the quiet enjoyment and protection of all our civil rights and liberties, which are the sure and general consequence of obedience to the municipal law, are in themselves the best and most valuable of all rewards. Because also, were the exercise of every virtue to be enforced by the proposal of particular rewards, it were impossible for any state to furnish stock enough for so profuse a bounty. And farther, because the dread of evil is a much more forcible principle of human actions than the prospect of good.[y] For which reasons, though a prudent bestowing of rewards is sometimes of exquisite use, yet we find that those civil laws, which enforce and enjoin our duty, do seldom, if ever, propose any privilege or gift to such as obey the law; but do constantly come armed with a penalty denounced against transgressors, either expressly defining the nature and quantity of the punishment, or else leaving it to the discretion of the judges, and those who are entrusted with the care of putting the laws in execution.

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[x] See page 34.

[57] Of all the parts of a law the most effectual is the *vindicatory*. For it is but lost labour to say, "do this, or avoid "that," unless we also declare, "this shall be the conse"quence of your non-compliance." We must therefore observe, that the main strength and force of a law consists in the penalty annexed to it. Herein is to be found the principal obligation of human laws.

Legislators and their laws are said to *compel* and *oblige;* not that by any natural violence they constrain a man, as to render it impossible for him to act otherwise than as they direct, which is the strict sense of obligation: but because, by declaring and exhibiting a penalty against offenders, they bring it to pass that no man can easily choose to transgress the law; since, by reason of the impending correction, compliance is in a high degree preferable to disobedience. And, even where rewards are proposed as well as punishments threatened, the obligation of the law seems chiefly to consist in the penalty: for rewards, in their nature, can only *persuade* and *allure;* nothing is *compulsory* but punishment.

It is true, it hath been holden, and very justly, by the principal of our ethical writers, that human laws are binding upon mens' consciences. But if that were the only or most forcible obligation, the good only would regard the laws, and the bad would set them at defiance. And, true as this principle is, it must still be understood with some restriction. It holds, I apprehend, as to *rights;* and that, when the law has determined the field to belong to Titius, it is matter of conscience no longer to withhold or to invade it. So also in regard to *natural duties*, and such offences as are *mala in se:* here we are bound in conscience, because we are bound

Offences are either *mala in se*, or *mala prohibita.*

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[y] Locke, Hum. Und. b. 2. c. 21.

by superior laws, before those human laws were in being, to perform the one and abstain from the other. But in relation to those laws which enjoin only *positive duties*, and forbid only such things as are not *mala in se* but *mala prohibita* merely, without any intermixture of moral guilt, annexing a penalty [58] of non-compliance, here I apprehend conscience is no farther concerned, than by directing a submission to the penalty, in case of our breach of those laws: for otherwise the multitude of penal laws in a state would not only be looked upon as an impolitic, but would also be a very wicked thing; if every such law were a snare for the conscience of the subject. But in these cases the alternative is offered to every man; "either "abstain from this, or submit to such a penalty:" and his conscience will be clear, whichever side of the alternative he thinks proper to embrace. Thus, by the recent statute for preserving the game,[z] a penalty is denounced against every person that kills a partridge between the first of February and the first of September in every year.[a] And so too, by other statutes, pecuniary penalties were inflicted for not performing statute-work on the public roads, and for innumerable other positive misdemeanors. Now these prohibitory laws do not make the transgression a moral offence, or sin: the only obligation in conscience is to submit to the penalty, if levied. It must however be observed, that we are here speaking of laws that are simply and purely penal, where the thing forbidden or enjoined is wholly a matter of indifference, and where the penalty inflicted is an adequate compensation for the civil inconvenience supposed to arise from the offence. But where disobedience to the law involves in it also any degree of public mischief or private injury, there it falls within our former distinction, and is also an offence against conscience.[b]

I have now gone through the definition laid down of a municipal law; and have shewn that it is "a rule—of civil

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[z] 1 & 2 Wm. 4, c. 7, §. 3.

[a] By the 54 Geo. 3, c. 96, 54 Geo. 3, c. 108. §. 1., 5 & 6 Wm. 4. c. 76. §. 14, some of the other instances originally mentioned by Blackstone can no longer be given, the penalties having been repealed.

[b] *Lex pure poenalis obligat tantum ad poenam, non item ad culpam: lex poenalis mixta et ad culpam obligat, et ad poenam.* (Sanderson *de conscient. obligat. prael. viii.* §. 17. 24.)

"conduct—prescribed—by the supreme power in a state—
[59] "commanding what is right, and prohibiting what is wrong:" in the explication of which I have endeavoured to interweave a few useful principles, concerning the nature of civil government, and the obligation of human laws. Before I conclude this section, it may not be amiss to add a few observations concerning the *interpretation* of laws.

Mode of interpreting the Roman law.

When any doubt arose upon the construction of the Roman laws, the usage was to state the case to the emperor in writing, and take his opinion upon it. This was certainly a bad method of interpretation. To interrogate the legislature to decide particular diputes, is not only endless, but affords great room for partiality and oppression. The answers of the emperor were called his rescripts, and these had in succeeding cases the force of perpetual laws; though they ought to be carefully distinguished, by every rational civilian, from those general constitutions, which had only the nature of things for their guide. The emperor Macrinus, as his historian Capitolinus informs us, had once resolved to abolish these rescripts, and retain only the general edicts; he could not bear that the hasty and crude answers of such princes as Commodus and Caracalla should be reverenced as laws. But Justinian thought otherwise,[c] and he has preserved them all. In like manner the canon laws, or decretal epistles of the popes, are all of them rescripts in the strictest sense. Contrary to all true forms of reasoning, they argue from particulars to generals.

Rules for interpreting English laws.

The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable. And these signs are either the words, the context, the subject-matter, the effects and consequence, or the spirit and reason of the law. Let us take a short view of them all.

Words to be understood in their usual signification.

1. Words are generally to be understood in their usual and most known signification: not so much regarding the propriety of grammar, as their general and popular use.
[60] Thus the law mentioned by Puffendorf,[d] which forbad a layman to *lay hands* on a priest, was adjudged to extend to him, who had hurt a priest with a weapon. Again; terms

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[c] *Inst.* 1. 2. 6.

[d] L. of N. and N. 5. 12. 3.

of art, or technical terms, must be taken according to the acceptation of the learned in each art, trade, and science. So in the act of settlement, where the crown of England is limited "to the princess Sophia, and the heirs of her body, being protestants," it becomes necessary to call in the assistance of lawyers, to ascertain the precise idea of the words "*heirs of her body*;" which in legal sense comprise only her lineal descendants.

According to the context.

2. If words happen to be still dubious, we may establish their meaning from the *context*; with which it may be of singular use to compare a word, or a sentence, whenever they are ambiguous, equivocal, or intricate. Thus the proeme, or preamble, is often called in to help the construction of an act of parliament. Of the same nature and use is the comparison of a law with other laws, that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point. Thus, when the law of England declares murder to be felony without benefit of clergy, we must resort to the same law of England to learn what the benefit of clergy is: and when the common law censures simoniacal contracts, it affords great light to the subject to consider what the canon law has adjudged to be simony.

As to the subject-matter.

3. As to the *subject-matter*, words are always to be understood as having a regard thereto; for that is always supposed to be in the eye of the legislator, and all his expressions directed to that end. Thus, when a law of our Edward III. forbids all ecclesiastical persons to purchase *provisions* at Rome, it might seem to prohibit the buying of grain and other victual; but when we consider that the statute was made to repress the usurpations of the papal see, and that the nominations to benefices by the pope were called *provisions*, we shall see that the restraint is intended to be laid upon such provisions only.

As to the effect.

4. As to the *effects* and *consequence*, the rule is, that where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them. Therefore the Bolognian law, mentioned by Puffendorf,[e] which enacted "that whoever drew blood in the streets should be punished with the utmost

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[e] *l.* 5. *c.* 12. §. 8.

severity," was held after a long debate not to extend to the surgeon, who opened the vein of a person that fell down in the street with a fit.

As to the reason and spirit.

5. But, lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the *reason* and *spirit* of it; or the cause which moved the legislator to enact it. For when this reason ceases, the law itself ought likewise to cease with it. An instance of this is given in a case put by Cicero, or whoever was the author of the treatise inscribed to Herennius.[f] There was a law, that those who in a storm forsook the ship should forfeit all property therein; and that the ship and lading should belong entirely to those who staid in it. In a dangerous tempest all the mariners forsook the ship, except only one sick passenger, who by reason of his disease was unable to get out and escape. By chance the ship came safe to port. The sick man kept possession, and claimed the benefit of the law. Now here all the learned agree, that the sick man is not within the reason of the law; for the reason of making it was, to give encouragement to such as should venture their lives to save the vessel: but this is a merit, which he could never pretend to, who neither staid in the ship upon that account, nor contributed any thing to it's preservation.

Hence equity has arisen.

From this method of interpreting laws, by the reason of them, arises what we call *equity;* which is thus defined by Grotius,[g] "the correction of that, wherein the law (by reason of it's universality) is deficient." For since in laws [62] all cases cannot be foreseen or expressed, it is necessary, that when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of defining those circumstances, which (had they been foreseen) the legislator himself would have expressed. And these are the cases, which, according to Grotius, "*lex* "*non exacte definit, sed arbitrio boni viri permittit.*"

Equity thus depending, essentially, upon the particular circumstances of each individual case, there can, in the general sense of the word, (although this must not be understood as applicable to equity, as adminstered in our equity courts; for here, as Blackstone himself[a] says, the system is "a laboured, "connected system, governed by established rules, and bound "down by precedents from which they do not depart, although "the reason of some of them may perhaps be liable to objection,") be no established rules and fixed precepts of equity laid down, without destroying it's very essence, and reducing it to a positive law. And, on the other hand, the liberty of considering all cases in an equitable light must not be indulged too far; lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge. And law, without equity, though hard and disagreeable, is much more desirable for the public good, than equity without law: which would make every judge a legislator, and introduce most infinite confusion; as there would then be almost as many different rules of action laid down in our courts, as there are differences of capacity and sentiment in the human mind.

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[f] *l.* 1. *c.* 11.

[g] *de aequitate,* §. 3

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[a] 3 Comm. c. 27. p. 432.

SECTION THE THIRD.

OF THE LAWS OF ENGLAND.

Municipal law consists of
- *Lex non scripta* or common law.
  - 1. General customs.
  - 2. Particular customs.
  - 3. Certain peculiar laws.
    - Civil law.
    - Canon law.
- *Lex scripta* or statnte law.

[63]

The municipal law is divided into *lex non scripta*, or common law, and *lex scripta*, or statute law.

THE municipal law of England, or the rule of civil conduct prescribed to the inhabitants of this kingdom, may with sufficient propriety be divided into two kinds; the *lex non scripta*, the unwritten or common law; and the *lex scripta*, the written or statute law.

lex non scripta or common law.

The *lex non scripta*, or unwritten law, includes not only *general customs*, or the common law properly so called; but also the *particular customs* of certain parts of the kingdom; and likewise those *particular laws*, that are by custom observed only in certain courts and jurisdictions.

When I call these parts of our law *leges non scriptæ*, I would not be understood as if all those laws were at present merely *oral*, or communicated from the former ages to the present solely by word of mouth. It is true indeed that, in the profound ignorance of letters which formerly overspread the whole western world, all laws were entirely traditional; for this plain reason, because the nations among which they prevailed had but little idea of writing. Thus the British as well as the Gallic druids committed all their laws as well as learning to memory;[a] and it is said of the primitive Saxons here, as well as their brethren on the continent, that

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[a] Caes. *de b. G. lib.* 6. *c.* 13.

leges sola memoria et usu retinebant.[b] But, with us at present, the monuments and evidences of our legal customs are contained in the records of the several courts of justice, in books of reports and judicial decisions, and in the treatises of learned sages of the profession, preserved and handed down to us from the times of highest antiquity. However I therefore style these parts of our law *leges non scriptæ*, because their original institution and authority are not set down in writing, as acts of parliament are, but they receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom. In like manner as Aulus Gellius defines the *jus non scriptum* to be that, which is "*tacito et illiterato* "*hominum consensu et moribus expressum.*"

In what it is contained.

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Our ancient lawyers, and particularly Fortescue,[c] insist with abundance of warmth, that these customs are as old as the primitive Britons; and continued down, through the several mutations of government and inhabitants, to the present time, unchanged and unadulterated. This may be the case as to some: but in general, as Mr. Selden in his notes observes, this assertion must be understood with many grains of allowance; and ought only to signify, as the truth seems to be, that there never was any formal exchange of one system of laws for another: though doubtless by the intermixture of adventitious nations, the Romans, the Picts, the Saxons, the Danes, and the Normans, they must have insensibly introduced and incorporated many of their own customs with those that were before established; thereby in all probability improving the texture and wisdom of the whole, by the accumulated wisdom of divers particular countries. Our laws, saith lord Bacon,[d] are mixed as our language: and, as our language is so much the richer, the laws are the more complete.

Antiquity of the common law.

And indeed our antiquaries and early historians do all positively assure us, that our body of laws is of this compounded nature. For they tell us, that in the time of Alfred the local customs of the several provinces of the kingdom were grown so various, that he found it expedient to compile

Alfred's dome-book.

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[b] Spelm. *Gl.* 362.

[c] *c.* 17.

[d] See his proposals of a digest.

his *dome-book*, or *liber judicialis*, for the general use of the [65] whole kingdom.[e] This book is said to have been extant so late as the reign of king Edward the fourth, but is now unfortunately lost. It contained, we may probably suppose, the principal maxims of the common law, the penalties for misdemeanors, and the forms of judicial proceedings. Thus much may at least be collected from that injunction to observe it, which we find in the laws of king Edward the elder, the son of Alfred.[f] "*Omnibus qui reipublicæ præ-*" *sunt etiam atque etiam mando, ut omnibus æquos se præ-*" *beant judices, perinde ac in judiciali libro* (*Saxonice*, " ꝺom-bec) *scriptum habetur: nec quicquam formident* " *quin jus commune* (*Saxonice*, ꝼolcꞃıhꞇe) *audacter libereque* " *dicant*."

In the 11th century three systems prevailed.
1. *Mercen-Lage.*
2. *West-Saxon Lage.*
3. *Dane-Lage.*

But the eruption and establishment of the Danes in England, which followed soon after, introduced new customs, and caused this code of Alfred in many provinces to fall into disuse; or at least to be mixed and debased with other laws of a coarser alloy. So that about the beginning of the eleventh century, there were three principal systems of laws, prevailing in different districts. 1. The *Mercen-Lage*, or Mercian laws, which were observed in many of the midland counties, and those bordering on the principality of Wales, the retreat of the ancient Britons; and therefore very probably intermixed with the British or Druidical customs. 2. The *West-Saxon-Lage*, or laws of the west Saxons, which obtained in the counties to the south and west of the island, from Kent to Devonshire. These were probably much the same with the laws of Alfred above-mentioned, being the municipal law of the far most considerable part of his dominions, and particularly including Berkshire, the seat of his peculiar residence. 3. The *Dane-Lage*, or Danish law, the very name of which speaks its original and composition. This was principally maintained in the rest of the midland counties, and also on the eastern coast, the part most exposed to the visits of that piratical people.

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[e] Mr. Hallam, however, calls it a loose report of late writers that Alfred compiled any general code for the government of his kingdom. *Midd. ages*. ch. viii. p. 1. See also *Turner's Hist. of Angl. Sax.* b. v. ch. 6.

[f] *c.* 1.

As for the very northern provinces, they were at that time under a distinct government.[g]

[66] Out of these three laws, Roger Hoveden[h] and Ranulphus Cestrensis[i] inform us, king Edward the confessor extracted one uniform law or digest of laws, to be observed throughout the whole kingdom; though Hoveden and the author of an old manuscript chronicle[k] assure us likewise, that this work was projected and begun by his grandfather king Edgar. And indeed a general digest of the same nature has been constantly found expedient, and therefore put in practice by other great nations, which were formed from an assemblage of little provinces, governed by peculiar customs. As in Portugal, under king Edward, about the beginning of the fifteenth century:[l] in Spain, under Alonzo X, who about the year 1250 executed the plan of his father St. Ferdinand, and collected all the provincial customs into one uniform law, in the celebrated code entitled *las partidas:*[m] and in Sweden, about the same æra; when a universal body of common law was compiled out of the particular customs established by the laghmen of every province, and entitled the *land's lagh*, being analogous to the *common law* of England.[n]

Out of which Edward the Confessor extracted a digest of laws.

Both these undertakings, of king Edgar and Edward the confessor, seem to have been no more than a new edition, or fresh promulgation, of Alfred's code or dome-book, with such additions and improvements as the experience of a century and an half had suggested. For Alfred is generally styled by the same historians the *legum Anglicanarum conditor*, as Edward the confessor is the *restitutor*. These however are the laws which our histories so often mention under the name of the laws of Edward the confessor; which our ancestors struggled so hardly to maintain, under the first princes of the Norman line; and which subsequent princes so frequently promised to keep and restore, as the most popular act they could do, when pressed by foreign emergencies or domestic discontents. These are the laws,

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[g] Hal. Hist. 55.

[h] *in Hen. II.*

[i] *in Edw. Confessor.*

[k] *in Seld. ad Eadmer.* 6.

[l] Mod. Un. Hist. xxii. 135.

[m] *Ibid.* xx. 211.

[n] *Ibid.* xxxiii. 21. 58.

[67] that so vigorously withstood the repeated attacks of the civil law; which established in the twelfth century a new Roman empire over most of the states of the continent: states that have lost, and perhaps upon that account, their political liberties; while the free constitution of England, perhaps upon the same account, has been rather improved than debased. These, in short, are the laws which gave rise and original to that collection of maxims and customs, which is now known by the name of the common law. A name either given to it, in contradistinction to other laws, as the statute law, the civil law, the law merchant, and the like; or, more probably, as a law common to all the realm, the *jus commune* or *folk-right* mentioned by king Edward the elder, after the abolition of the several provincial customs and particular laws before-mentioned.

On what the goodness of a custom depends.

But though this is the most likely foundation of this collection of maxims and customs, yet the maxims and customs, so collected, are of higher antiquity than memory or history can reach: nothing being more difficult than to ascertain the precise beginning and first spring of an antient and long established custom. Whence it is, that in our law, the goodness of a custom depends upon its having been used time out of mind, so far as the nature of the case makes it reasonable; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary. This it is that gives it its weight and authority: and of this nature are the maxims and customs which compose the common law, or *lex non scripta*, of this kingdom.

The common law is distinguishable into 1, General customs; 2, Particular customs, and 3, Certain particular laws.

This unwritten, or common, law is properly distinguishable into three kinds: 1. General customs; which are the universal rule of the whole kingdom, and form the common law, in its stricter and more usual signification. 2. Particular customs; which for the most part affect only the inhabitants of particular districts. 3. Certain particular laws; which by custom are adopted and used by some particular courts, of pretty general and extensive jurisdiction.

I. General customs.

[68] I. As to general customs, or the common law, properly so called; this is that law, by which proceeedings and determinations in the king's ordinary courts of justice are guided and directed. This, for the most part, settles the course in

which lands descend by inheritance; the manner and form of acquiring and transferring property; the solemnities and obligation of contracts; the rules of expounding wills, deeds, and acts of parliament; the respective remedies of civil injuries; the several species of temporal offences, with the manner and degree of punishment; and an infinite number of minuter particulars, which diffuse themselves as extensively as the ordinary distribution of common justice requires. Thus, for example, that there shall be four superior courts of record; the chancery, the king's bench, the common pleas, and the exchequer;—that the eldest son alone is heir to his ancestor;—that property may be acquired and transferred by writing;—that a deed is of no validity unless sealed and delivered:—that wills shall be construed more favourably, and deeds more strictly;—that money lent upon bond is recoverable by action of debt;—that breaking the public peace is an offence, and punishable by fine and imprisonment;—all these are doctrines that are not set down in any written statute or ordinance, but depend merely upon immemorial usage, that is, upon common law, for their support.

Common law also divided, but erroneously into, 1. established customs, and 2. established rules.

Some have divided the common law into two principal grounds or foundations: 1. Established customs; such as that, where there are three brothers, the eldest brother shall be heir to the second, in exclusion of the youngest: and 2. Established rules and maxims; as "that the king can "do no wrong, that no man shall be bound to accuse him-"self," and the like. But I take these to be one and the same thing. For the authority of these maxims rests entirely upon general reception and usage: and the only method of proving, that this or that maxim is a rule of the common law, is by shewing that it hath been always the custom to observe it.

The validity of a custom is decided on by the judges.

[69] But here a very natural, and very material, question arises: how are these customs or maxims to be known, and by whom is their validity to be determined? The answer is, by the judges in the several courts of justice. They are the depositaries of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land. Their knowledge of that law is derived from experience and study; from the "*viginti*

Whose judgments are preserved in the records,

and are followed as precedents.

"*annorum lucubrationes,*" which Fortescue[o] mentions; and from being long personally accustomed to the judicial decisions of their predecessors. And indeed these judicial decisions are the principal and most authoritative evidence, that can be given, of the existence of such a custom as shall form a part of the common law. The judgment itself, and all the proceedings previous thereto, are carefully registered and preserved, under the name of *records,* in public repositories set apart for that particular purpose; and to them frequent recourse is had, when any critical question arises, in the determination of which former precedents may give light or assistance. And therefore, even so early as the Conquest, we find the "*præteritorum memoria eventorum*" reckoned up as one of the chief qualifications of those, who were held to be "*legibus patriæ optime instituti.*"[p] For it is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently
[70] contrary to reason; much more if it be clearly contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law,* but that it was *not law;* that is, that it is not the established custom of the realm, as has been erroneously determined. And hence it is that our lawyers are with justice so copious in their encomiums on the reason of the common law; that they tell us, that the law is the perfection of reason, that it always intends

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[o] *cap.* 8.

[p] Seld. review of Tith. c. 8.

to conform thereto, and that what is not reason is not law. Not that the particular reason of every rule in the law can at this distance of time be always precisely assigned; but it is sufficient that there be nothing in the rule flatly contradictory to reason, and then the law will presume it to be well founded.[q] And it hath been an ancient observation in the laws of England, that whenever a standing rule of law, of which the reason perhaps could not be remembered or discerned, hath been wantonly broken in upon by statutes or new resolutions, the wisdom of the rule hath in the end appeared from the inconveniences that have followed the innovation.

Unless flatly absurd;

The doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust: for though their reason be not obvious at first view, yet we owe such a deference to former times, as not to suppose that they acted wholly without consideration. To illustrate this doctrine by examples. It had been determined, time out of mind, although the law in this respect has lately been altered,[r] that a brother of the half blood should never succeed as heir to the estate of his half brother, but it should rather escheat to the king, or other superior lord. Now this was a positive law, fixed and established by custom, which custom is evidenced by judicial decisions; and therefore could never be departed from by any modern judge without a breach of his oath and the law. For herein there was nothing repugnant to natural [71] justice; though the artificial reason of it, drawn from the feodal law, might not be quite obvious to every body. And therefore, though a modern judge, on account of a supposed hardship upon the half brother, might wish it had been otherwise settled, yet it was not in his power to alter it; the best proof of which is, that to do this it was found necessary to call in the aid of the statute law. But if any court had determined, before the recent alteration of this rule, that an elder brother of the half blood might enter upon and seize any lands that were purchased by his younger brother, no subsequent judges would have scrupled to declare that such prior determination was unjust, was unreasonable, and therefore was *not law*. So that *the law*, and the *opinion of the judge*, are not always convertible terms, or one and the same thing; since it sometimes may happen, that the judge may *mistake* the law. It must however be admitted, that judges have sometimes felt themselves authorized, although chiefly of late years, to decide contrary to the weight of precedent. Thus it was a settled doctrine of the courts from the time of Bracton down to the end of the last century, that a person in bare possession of land, might convey the fee simple by making a feoffment, a principle of great practical importance. But this rule was disregarded by Lord *Mansfield* and treated as inconvenient, and his opinion has been supported by subsequent judges.[r] Upon the whole, however, we may take it as a general rule. "that the decisions of courts of justice are "the evidence of what is commou law:" in the same manner as, in the civil law, what the emperor had once determined, was to serve for a guide for the future.[s]

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[q] Herein agreeing with the civil law, *Ff.* 1. 3. 20, 21. "*Non omnium,* "*quae a majoribus nostris constituta* "*sunt, ratio reddi potest. Et ideo ra-* "*tiones eorum, quae constituuntur,* "*inquiri non oportet: alioquin multa* "*ex his, quae certa sunt, subvertun-* "*tur.*"

[r] 3 & 4 Wm. 4. c. 106. s. 9.

but as a general rule the decisions of courts of justice are evidence of the common law,

The decisions therefore of courts are held in the highest regard, and are not only preserved as authentic records in the treasuries of the several courts, but are handed out to public view in the numerous volumes of *reports* which furnish the lawyer's library. These reports are histories of the several cases, with a short summary of the proceedings which are preserved at large in the record, the arguments on both sides, and the reasons the court gave for its judgment; taken down in short notes by persons present at the determination. And these serve as indexes to, and also to ex-

and they are handed down in *reports*,

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[r] See as to this, Butler's n. Co. Litt. 330 b. *Taylor* v. *Horde*, 1 Burr. 60; *Doe dem. Maddock* v. *Lynes*, 3 B. & C. 388. As another instance in which the whole stream of precedents has been over-ruled. See the case of *Perrin* v. *Blake*, 4 Burr. 2579, discussed with the greatest learning and ability by Mr. Fearne, in his work on *Contingent Remainders*, p. 156, *et seq.* See also, as to this, the case of *Ffytche* v. *Bishop of London*, 2 Bro. P. C. 211, and what is said by Lord *Eldon*, 6 Dow, 112, and by Lord *Tenterden*, 3 Bar. & Ad. 17.

[s] "*Si imperialis majestas causam* "*cognitionaliter examinaverit, et partibus cominus constitutis sententiam* "*dixerit, omnes omnino judices, qui* "*sub nostro imperio sunt, sciant hanc* "*esse legem, non solum illi causae pro* "*qua producta est, sed et in omnibus* "*similibus.*" C. 1. 14. 12.

which are extant from the reign of Edward the Second, and were formerly published annually and called *year books.*

plain, the records; which always, in matters of consequence and nicety, the judges direct to be searched. The reports are extant in a regular series from the reign of king Edward the second inclusive; and from his time to that of Henry the eighth were taken by the prothonotaries, or chief scribes of the court, at the expense of the crown, and published *annually*, whence they are known under the denomination of the *year books.* And it is much to be wished that this beneficial custom had, under proper regulations, been continued to this day: for, though king James the first at the instance of lord Bacon appointed two reporters[t] with a handsome stipend for this purpose, yet that wise institution was soon neglected; and, from the reign of Henry the eighth to the present time, this task has been executed by many private and contemporary hands; who sometimes through haste and inaccuracy, sometimes through mistake and want of skill, have published very crude and imperfect (perhaps contradictory) accounts of one and the same determination. And these remarks have certainly lost none of their force since the time of Blackstone, the number of our reports having increased to an almost innumerable extent. Some of the most valuable of the ancient reports are those published by lord chief justice Coke; a man of infinite learning in his profession, though not a little infected with the pedantry and quaintness of the times he lived in, which appear strongly in all his works. However his writings are so highly esteemed, that they are generally cited without the author's name.[u]

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Ancient legal authors whose works are of authority.

Besides these reporters, there are also other authors, to whom great veneration and respect is paid by the students of the common law. Such are Glanvil and Bracton, Britton and Fleta, Hengham and Littleton, Statham, Brooke, Fitzherbert, and Staundforde, with some others of ancient date; whose treatises are cited as authority, and are evidence that cases have formerly happened, in which such and such points were determined, which are now become settled and first principles. One of the last of these methodical writers in point of time, whose works are of any intrinsic authority in the courts of justice, and do not entirely depend on the [73] strength of their quotations from older authors, is the same learned judge we have just mentioned, sir Edward Coke; who hath written four volumes of institutes, as he is pleased to call them, though they have little of the institutional method to warrant such a title. The first volume is a very extensive comment upon a little excellent treatise of tenures, compiled by judge Littleton in the reign of Edward the fourth. This comment is a rich mine of valuable common law learning, collected and heaped together from the ancient reports and year books, but greatly defective in method.[w] The second volume is a comment upon many old acts of parliament, without any systematical order; the third a more methodical treatise of the pleas of the crown; and the fourth an account of the several species of courts.[x]

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[t] *Pat.* 15. *Jac. I. p.* 18. 17 Rym. 26.

[u] His reports, for instance, are styled, κατ' ἐξοχην, *the reports;* and in quoting them we usually say, 1 or 2 Rep. not 1 or 2 Coke's Rep. as in citing other authors. The reports of judge Croke are also cited in a peculiar manner, by the name of those princes, in whose reigns the cases reported in his three volumes were determined; *viz.* queen Elizabeth, king James, and king Charles the first; as well as by the number of each volume. For sometimes we call them 1, 2, and 3 Cro. but more commonly Cro. Eliz. Cro. Jac. and Cro. Car.

Coke's Institutes.

And thus much for the first ground and chief corner stone of the laws of England, which is general immemorial custom, or common law, from time to time declared in the decisions of the courts of justice: which decisions are preserved among our public records, explained in our reports, and digested for general use in the authoritative writings of the venerable sages of the law.

The Roman law also paid attention to custom.

The Roman law, as practised in the times of its liberty, paid also a great regard to custom; but not so much as our law: it only then adopting it, when the written law was deficient. Though the reasons alleged in the digest[y] will fully justify our practice, in making it of equal authority with, when it is not contradicted by, the written law. "For

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[w] It is usually cited either by the name of Co. Litt. or as 1 Inst.

[x] These are cited as 2, 3, or 4 Inst. without any author's name. An honorary distinction, which, we observe, is paid to the works of no other writer; the generality of reports and other tracts being quoted in the name of the compiler, as 2 Ventris, 4 Leonard, 1 Siderfin, and the like.

[y] *Ff.* 1. 3. 32.

"since, says Julianus, the written law binds us for no other "reason but because it is approved by the judgment of the "people, therefore those laws which the people have approved without writing ought also to bind every body. "For where is the difference, whether the people declare "their assent to a law by suffrage, or by a uniform course "of acting accordingly?" Thus did they reason while Rome had some remains of her freedom: but, when the imperial tyranny came to be fully established, the civil laws speak a very different language. "*Quod principi placuit* "*legis habet vigorem, cum populus ei et in eum omne suum* "*imperium et potestatem conferat,*" says Ulpian.[h] "*Imperator solus et conditor et interpres legis existimatur,*" says the code:[i] and again, "*sacrilegii instar est rescripto* "*principis obviari.*"[k] And indeed it is one of the characteristic marks of English liberty, that our common law depends upon custom; which carries this internal evidence of freedom along with it, that it probably was introduced by the voluntary consent of the people.

II. Particular customs.

II. The second branch of the unwritten laws of England are particular customs, or laws which affect only the inhabitants of particular districts.

These particular customs, or some of them, are without doubt the remains of that multitude of local customs before-mentioned, out of which the common law, as it now stands, was collected at first by king Alfred, and afterwards by king Edgar and Edward the confessor: each district mutually sacrificing some of its own special usages, in order that the whole kingdom might enjoy the benefit of one uniform and universal system of laws. But, for reasons that have been now long forgotten, particular counties, cities, towns, manors, and lordships, were very early indulged with the privilege of abiding by their own customs, in contradistinction to the rest of the nation at large: which privilege is confirmed to them by several acts of parliament.[l]

As gavelkind in Kent.

Such is the custom of gavelkind in Kent and some other parts of the kingdom (though perhaps it was also general till the Norman conquest) which ordains, among other things, [75] that not the eldest son only of the father shall succeed to his inheritance, but all the sons alike: and that, though the ancestor be attainted and hanged, yet the heir shall succeed to his estate, without any escheat to the lord.—Such is the custom that prevails in divers ancient boroughs, and therefore called borough-english, that the youngest son shall inherit the estate, in preference to all his elder brothers.—Such is the custom in other boroughs that a widow shall be entitled, for her dower, to all her husband's lands; whereas at the common law she shall be endowed of one-third part only.—Such also are the special and particular customs of manors, of which every one has more or less, and which bind all the copyhold and customary tenants that hold of the said manors.—Such likewise is the custom of holding divers inferior courts, with power of trying causes, in cities and trading towns; the right of holding which, when no royal grant can be shewn, depends entirely upon immemorial and established usage.—Such, lastly, are many particular customs within the city of London, with regard to trade, apprentices, widows, orphans, and a variety of other matters. All these are contrary to the general law of the land, and are good only by special usage: though the customs of London are also confirmed by act of parliament.[m] It is here to be observed, however, that a strong desire to abolish these particular customs has recently been expressed, more especially such of them as relate to the law of property, and thus to render this important branch of our law more certain and uniform. Thus it is, that the real property commissioners[n] have recommended the abolition of the customs of gavelkind and borough-english, and a bill has been repeatedly brought in for the purpose, and by the late municipal corporation act,[o] all exclusive rights of trading claimed by the custom or bye-law of a borough are abolished.

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[h] *Ff.* 1. 4. 1.

[i] *C.* 1. 14. 12.

[k] *C.* 1. 23. 5.

[l] *Mag. Chart.* 9 Hen. III. c. 9.—1 Edw. III. st. 2. c. 9.—14 Edw. III. st. 2. c. 1.—and 2 Hen. IV. c. 1.

Borough-English.

Other instances of particular customs.

Desire to abolish particular customs.

Lex mercatoria.

To this head may most properly be referred a particular system of customs used only among one set of the king's subjects, called the custom of merchants or *lex mercatoria:* which, however different from the general rules of the common law, is yet ingrafted into it, and made a part of it;[q] being allowed, for the benefit of trade, to be of the utmost validity in all commercial transactions: for it is a maxim of law, that "*cuilibet in sua arte credendum est.*" And here perhaps we may also place that portion of our law which arises from the usages of the profession; the most settled and important of which consists in what is called the *practice of conveyancers*, which has been frequently recognized by the judges, and will be referred to and held binding in matters within its province.[q]

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[m] 8 Rep. 126. Cro. Car. 347.

[n] 3rd Real Property Report.

[o] 5 & 6 W. 4. c. 76. s. 14.

Practice of conveyancers.

The rules relating to particular customs regard either the *proof* of their existence; their *legality* when proved; or their usual method of *allowance*. And first we will consider the rules of *proof.*

[76]

Proof of existence of customs.

As to gavelkind, and borough-english, the law takes particular notice of them,[r] and there is no occasion to prove that such customs actually exist, but only that the lands in question are subject thereto. All other private customs must be particularly pleaded,[s] and as well the existence of such customs must be shewn, as that the thing in dispute is within the custom alleged. The trial in both cases (both to shew the existence of the custom, as, "that in the manor of Dale "lands shall descend only to the heirs male, and never to the "heirs female;" and also to shew "that the lands in ques"tion are within that manor") is by a jury of twelve men, and not by the judges; except the same particular custom has been before tried, determined, and recorded in the same court.[t]

Customs of London how proved.

The customs of London differ from all others in point of trial: for, if the existence of the custom be brought in question, it shall not be tried by a jury, but by certificate from the lord mayor and aldermen by the mouth of their recorder,[u] unless it be such a custom as the corporation is itself interested in, as a right of taking toll, &c., for then the law

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[p] Winch. 24.

[q] Per Lord Hardwicke, 1 T. R. 768. And see what Lord Eldon says, 6 Ves. 184–5, and in 1 Sugd. Vend. 505, ed. 9.

[r] Co. Litt. 175.

[s] Litt. §. 265. *Clements* v. *Scudamore*, 1 Salk. 243.

[t] Dr. & St. 1. 10.

[u] Cro. Car. 516.

permits them not to certify on their own behalf;[v] and if a custom has once been certified by the recorder, the judges will take notice thereof in future, and they will not suffer it to be certified over again.[w]

As to the legality of a custom.

When the custom is actually proved to exist, the next inquiry is into the *legality* of it; for, if it is not a good custom, it ought to be no longer used. "*Malus usus abolendus est*" is an established maxim of the law.[x] To make a particular custom good, the following are necessary requisites.

Rules as to.

1. That it have been used so long, that the memory of man runneth not to the contrary. So that, if any one can shew the beginning of it, it is no good custom. For which [77] reason no custom can prevail against an express act of parliament; since the statute itself is a proof of a time when such a custom did not exist.[y] But certain exceptions to this rule have recently been made by statute. Thus it was formerly necessary, in claiming a right of way or of common, or an exemption from tithes, to shew that such rights had been enjoyed, or such exemption had existed before the time of legal memory, which was the first year of the reign of Richard the First, but by the statutes[z] to which I allude, it is now sufficient to shew an uninterrupted enjoyment for a certain number of years to establish the claims of this nature.

2. It must have been *continued*. Any interruption would cause a temporary ceasing: the revival gives it a new beginning, which will be within time of memory, and thereupon the custom will be void. But this must be understood with regard to an interruption of the *right;* for an interruption of the *possession* only, for ten or twenty years, will not destroy the custom.[a] As if the inhabitants of a parish have a customary right of watering their cattle at a certain pool, the custom is not destroyed, though they do not use it for ten years; it only becomes more difficult to prove: but if

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[v] Hob. 85.

[w] *Blaqueire* v. *Hawkins*, Doug. 363.

[x] Litt. §. 212. 4 Inst. 274.

[y] Co. Litt. 113.

[z] 2 & 3 W. 4. c. 71. and 2 & 3 W. 4. c. 100. For an account of which, and the alteration effected by them in the law on these subjects, see the *Principles of the Law of Real Property*, book 1. chap. 2.

[a] Co. Litt. 114.

the *right* be any how discontinued for a day, the custom is quite at an end.

3. It must have been *peaceable*, and acquiesced in; not subject to contention and dispute.[b] For as customs owe their original to common consent, their being immemorially disputed, either at law or otherwise, is a proof that such consent was wanting.

4. Customs must be *reasonable*;[c] or rather, taken negatively, they must not be unreasonable. Which is not always, as Sir Edward Coke says,[d] to be understood of every unlearned man's reason, but of artificial and legal reason, warranted by authority of law. Upon which account a custom may be good, though the particular reason of it cannot be assigned; for it sufficeth, if no good legal reason can be assigned against it. Thus a custom in a parish, that no man shall put his beasts into the common till the third of October, would be good; and yet it would be hard to shew the reason why that day in particular is fixed upon, rather than the day before or after. But a custom, that no cattle shall be put in till the lord of the manor has first put in his, is unreasonable, and therefore bad: for peradventure the lord will never put in his; and then the tenants will lose all their profits.[e]

5. Customs ought to be *certain*. A custom, that lands [78] shall descend to the most worthy of the owner's blood, is void; for how shall this worth be determined? but a custom to descend to the next male of the blood, exclusive of females, is certain, and therefore good.[f] A custom to pay two pence an acre in lieu of tithes, is good; but to pay sometimes two pence and sometimes three pence, as the occupier of the land pleases, is bad for it's uncertainty. Yet a custom to pay a year's improved value for a fine on a copyhold estate, is good; though the value is a thing uncertain: for the value may at any time be ascertained; and the maxim of law is, *id certum est, quod certum reddi potest.*

6. Customs, though established by consent, must be (when established) *compulsory;* and not left to the option

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[b] Co. Litt. 114.

[c] Litt. §. 212.

[d] 1 Inst. 62.

[e] Co. Copyh. §. 33.

[f] 1 Roll. Abr. 565.

of every man, whether he will use them or no. Therefore a custom, that all the inhabitants shall be rated toward the maintenance of a bridge, will be good; but a custom that every man is to contribute thereto at his own pleasure, is idle and absurd, and indeed no custom at all.

7. Lastly, customs must be *consistent* with each other: one custom cannot be set up in opposition to another. For if both are really customs, then both are of equal antiquity, and both established by mutual consent: which to say of contradictory customs is absurd. Therefore, if one man prescribes that by custom he has a right to have windows looking into another's garden; the other cannot claim a right by custom to stop up or obstruct those windows: for these two contradictory customs cannot both be good, nor both stand together. He ought rather to deny the existence of the former custom.[g]

Next, as to the *allowance* of special customs. Customs, in derogation of the common law, must be construed strictly. Thus, by the custom of gavelkind, an infant of fifteen years [79] may by one species of conveyance (called a deed of feoffment) convey away his lands in fee simple, or for ever. Yet this custom does not empower him to use any other conveyance, or even to lease them for seven years: for the custom must be strictly pursued.[h] And, moreover, all special customs must submit to the king's prerogative. Therefore, if the king purchases lands of the nature of gavelkind, where all the sons inherit equally; yet, upon the king's demise, his eldest son shall succeed to those lands alone.[i] And thus much for the second part of the *leges non scriptæ*, or those particular customs which affect particular persons or districts only.

III. Certain peculiar laws.

III. The third branch of them are those peculiar laws, which by custom are adopted and used only in certain peculiar courts and jurisdictions. And by these I understand the civil and canon laws.

Civil and canon laws.

It may seem a little improper at first view to rank these laws under the head of *leges non scriptæ*, or unwritten laws,

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[g] 9 Rep. 58. *Wiglesworth* v. *Dallison*, Doug. 190.

[h] Co. Cop. §. 33.

[i] Co. Litt. 15.

seeing they are set forth by authority in their pandects, their codes, and their institutions; their councils, decrees, and decretals; and enforced by an immense number of expositions, decisions, and treatises of the learned in both branches of the law. But I do this, after the example of Sir Matthew Hale,[j] because it is most plain, that it is not on account of their being *written* laws, that either the canon law, or the civil law, have any obligation within this kingdom: neither do their force and efficacy depend upon their own intrinsic authority; which is the case of our written laws, or acts of parliament. They bind not the subjects of England, because their materials were collected from popes or emperors; were digested by Justinian, or declared to be authentic by Gregory. These considerations give them no authority here: for the legislature of England doth not, nor ever did, recognize any foreign power, as superior or equal to it in this kingdom; or as having the right to give law to any, the meanest, of its subjects. But all the strength that either the papal or imperial laws have obtained in this [80] realm (or indeed in any other kingdom in Europe,) is only because they have been admitted and received by immemorial usage and custom in some particular cases, and some particular courts; and then they form a branch of the *leges non scriptæ*, or customary laws: or else, because they are in some other cases introduced by consent of parliament, and then they owe their validity to the *leges scriptæ*, or statute law. This is expressly declared in those remarkable words of the statute 25 Henry VIII., c. 21, addressed to the king's royal majesty.—" This your grace's realm, re-
" cognizing no superior under God but only your grace,
" hath been and is free from subjection to any man's laws,
" but only to such as have been devised, made, and ordained
" *within* this realm for the wealth of the same; or to such
" other as, by sufferance of your grace and your progenitors,
" the people of this your realm have taken at their free
" liberty, by their own consent, to be used among them:
" and have bound themselves by long use and custom to the
" observance of the same: not as to the observance of the
" laws of any foreign prince, potentate, or prelate; but as

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[j] Hist. C. L. c. 2.

"to the *customed* and ancient laws of this realm, originally "established as laws of the same, by the said sufferance, "consents, and custom; and none otherwise."

Civil law, what it is comprised in.

By the civil law, absolutely taken, is generally understood the civil or municipal law of the Roman empire, as comprised in the institutes, the code, and the digest of the emperor Justinian, and the novel constitutions of himself and some of his successors. Of which, as there will frequently be occasion to cite them, by way of illustrating our own laws, it may not be amiss to give a short and general account.

The Roman law (founded first upon the regal constitutions of their ancient kings, next upon the twelve tables of the *decemviri*, then upon the laws or statutes enacted by the senate or people, the edicts of the prætor, and the *responsa prudentum* or opinions of learned lawyers, and lastly upon [81] the imperial degrees, or constitutions of successive emperors) had grown to so great a bulk, or, as Livy expresses it,[k] "*tam immensus aliarum super alias acervatarum legum* "*cumulus*," that they were computed to be many camels' load by an author who preceded Justinian.[l] This was in part remedied by the collections of three private lawyers, Gregorius, Hermogenes, and Papirius; and then by the emperor Theodosius the younger, by whose orders a code was compiled, A. D. 438, being a methodical collection of all the imperial constitutions then in force: which Theodosian code was the only book of civil law received as authentic in the western part of Europe, till many centuries after; and to this it is probable that the Franks and Goths might frequently pay some regard, in framing legal constitutions for their newly erected kingdoms. For Justinian commanded only in the eastern remains of the empire; and it was under his auspices, that the present body of civil law was compiled and finished by Tribonian and other lawyers, about the year 533.

Theodosian code.

What it consists of.

This consists of, 1. The institutes; which contain the elements or first principles of the Roman law, in four books. 2. The digests, or pandects, in fifty books; containing the opinions and writings of eminent lawyers, digested in a systematical method. 3. A new code, or collection of imperial constitutions, in twelve books; the lapse of a whole century having rendered the former code, of Theodosius, imperfect. 4. The novels, or new constitutions, posterior in time to the other books, and amounting to a supplement to the code; containing new decrees of successive emperors, as new questions happened to arise. These form the body of Roman law, or *corpus juris civilis*, as published about the time of Justinian; which however fell soon into neglect and oblivion, till about the year 1130, when a copy of the digests was found at Amalfi in Italy: which accident, concurring with the policy of the Roman ecclesiastics,[m] suddenly gave new vogue and authority to the civil law, introduced it into several nations, and occasioned that mighty inundation of [82] voluminous comments, with which this system of law, more than any other, is now loaded.

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[k] *l.* 3. *c.* 34.

[l] Taylor's elements of civil law. 17.

Canon law, what it consists of.

The canon law is a body of Roman ecclesiastical law, relative to such matters as that church either has, or pretends to have, the proper jurisdiction over. This is compiled from the opinions of the ancient Latin fathers, the decrees of general councils, and the decretal epistles and bulles of the holy see. All which lay in the same disorder and confusion as the Roman civil law: till, about the year 1151, one Gratian an Italian monk, animated by the discovery of Justinian's pandects, reduced the ecclesiastical constitutions also into some method, in three books; which he entitled *concordia discordantium canonum*, but which are generally known by the name of *decretum Gratiani*. These reached as low as the time of pope Alexander III. The subsequent papal decrees, to the pontificate of Gregory IX, were published in much the same method under the auspices of that pope, about the year 1230, in five books; entitled *decretalia Gregorii noni*. A sixth book was added by Boniface VIII. about the year 1298, which is called *sextus decretalium*. The Clementine constitutions, or decrees of Clement V., were in like manner authenticated in 1317 by his successor John XXII; who also published twenty constitutions of his own, called the *extravagantes Joannis:* all which in some measure answer to the novels of the civil law. To these

Decretum Gratiani.

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[m] See §. 1. p. 14.

have been since added some decrees of later popes in five books, called *extravagantes communes*. And all these together, Gratian's decree, Gregory's decretals, the sixth decretal, the Clementine constitutions, and the extravagants of John and his successors, form the *corpus juris canonici*, or body of the Roman canon law.

Besides these pontificial collections, which during the times of popery were received as authentic in this island, as well as in other parts of christendom, there is also a kind of national canon law, composed of *legatine* and *provincial* constitutions, and adapted only to the exigencies of this [83] church and kingdom. The *legatine* constitutions were ecclesiastical laws, enacted in national synods, held under the cardinals Otho and Othobon, legates from pope Gregory IX. and pope Clement IV., in the reign of king Henry III., about the years 1220 and 1268. The *provincial* constitutions are principally the decrees of provincial synods, held under divers archbishops of Canterbury, from Stephen Langton in the reign of Henry III. to Henry Chichele in the reign of Henry V.; and adopted also by the province of York[n] in the reign of Henry VI. At the dawn of the Reformation, in the reign of king Henry VIII., it was enacted in parliament[o] that a review should be had of the canon law; and, till such review should be made, all canons, constitutions, ordinances, and synodals provincial, being then already made, and not repugnant to the law of the land or the king's prerogative, should still be used and executed. And, as no such review has yet been perfected, upon this statute now depends the authority of the canon law in England.

As for the canons enacted by the clergy under James I, in the year 1603, and never confirmed in parliament, it has been solemnly adjudged upon the principles of law and the constitution, that where they are not merely declaratory of the ancient canon law, but are introductory of new regulations, they do not bind the laity;[p] whatever regard the clergy may think proper to pay them.

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[n] Burn's eccl. law, pref. viii.

[o] Statute 25 Hen. VIII, c. 19; revived and confirmed by 1 Eliz. c. 1.

[p] Stra. 1057.

Courts in which civil and canon laws are used.

There are four species of courts, in which the civil and canon laws are permitted (under different restrictions) to be used. 1. The courts of the archbishops and bishops, and their derivative officers, usually called in our law courts christian, *curiæ christianitatis*, or the ecclesiastical courts. 2. The military courts. 3. The courts of admiralty. 4. The courts of the two universities. In all, their reception in general, and the different degrees of that reception, are grounded entirely upon custom; corroborated in the latter instance by act of parliament, ratifying those charters which [84] confirm the customary law of the universities. The more minute consideration of these will fall properly under that part of these commentaries which treats of the jurisdiction of courts. It will suffice at present to remark a few particulars relative to them all, which may serve to inculcate more strongly the doctrine laid down concerning them.[q]

Superintendence over these courts by the courts of common law.

1. And, first, the courts of common law have the superintendency over these courts; to keep them within their jurisdictions, to determine wherein they exceed them, to restrain and prohibit such excess, and (in case of contumacy) to punish the officer who executes, and in some cases the judge who enforces, the sentence so declared to be illegal.

Who will grant prohibitions in certain cases.

2. The common law has reserved to itself the exposition of all such acts of parliament, as concern either the extent of these courts, or the matters depending before them. And therefore, if these courts either refuse to allow these acts of parliament, or will expound them in any other sense than what the common law puts upon them, the king's courts at Westminster will grant prohibitions to restrain and control them.

An appeal lies from ecclesiastical courts to the king.

3. An appeal lies from all these courts to the king, in the last resort; which proves that the jurisdiction exercised in them is derived from the crown of England, and not from any foreign potentate, or intrinsic authority of their own.— And, from these three strong marks and ensigns of superiority, it appears beyond a doubt, that the civil and canon laws, though admitted in some cases by custom in some courts, are only subordinate, and *leges sub graviori lege;* and that, thus admitted, restrained, altered, new-modelled,

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[q] Hale Hist. c. 2.

and amended, they are by no means with us a distinct independent species of laws, but are inferior branches of the customary or unwritten laws of England, properly called the king's ecclesiastical, the king's military, the king's maritime, or the king's academical, laws.

[85]

Lex scriptæ or statute law.

Let us next proceed to the *leges scriptae*, the written laws of the kingdom; which are statutes, acts, or edicts, made by the king's majesty, by and with the advice and consent of the lords spiritual and temporal and commons in parliament assembled.[r] The oldest of these now extant, and printed in our statute books, is the famous *magna charta*, as confirmed in parliament 9 Hen. III: though doubtless there were many acts before that time, the records of which are now lost, and the determinations of them perhaps at present currently received for the maxims of the old common law, thus forming part of the *leges non scriptæ*.[s]

The manner of making these statutes will be better considered hereafter, when we examine the constitution of parliaments. At present we will only take notice of the different kinds of statutes; and of some general rules with regard to their construction.[t]

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[r] 8 Rep. 20.

[s] 1 *Reeve Hist.* C. L. 215. *Hale Hist.* C. L. 66. Wilmot, C. J. says, that the common law is nothing but statutes worn out by time. 2 Wils. 348.

[t] The method of citing these acts of parliament is various. Many of our ancient statutes are called after the name of the place where the parliament was held that made them; as the statutes of Merton and Marleberge, of Westminster, Gloucester, and Winchester. Others are denominated entirely from their subject; as the statutes of Wales and Ireland, the *articuli cleri*, and the *prærogativa regis*. Some are distinguished by their initial words, a method of citing very ancient; being used by the Jews in denominating the books of the pentateuch; by the christian church in distinguishing their hymns and divine offices; by the Romanists in describing their papal bulles; and in short by the whole body of ancient civilians and canonists, among whom this method of citation generally prevailed, not only with regard to chapters, but inferior sections also; in imitation of all which we still call some of our old statutes by their initial words, as the statute of *quia emptores*, and that of *circumspecte agatis*. But the most usual method of citing them, especially since the time of Edward the second, is by naming the year of the king's reign in which the statute was made, together with the chapter, or particular act, according to it's numeral order, as, 9 Geo. II. c. 4. For all the acts of one session of parliament taken together make properly but one statute; and therefore when two sessions have been held in one year, we usually mention stat. 1 or 2. Thus the bill of rights is cited, as 1 W.

Different kinds of statute law.

First, as to their several kinds. Statutes are either *general* or *special, public* or *private.* A general or public act is an universal rule, that regards the whole community: and of this the courts of law are bound to take notice judicially and *ex officio;* without the statute being particularly pleaded, or formally set forth by the party who claims an advantage under it. Special or private acts are rather exceptions than rules, being those which only operate upon particular persons, and private concerns: such as the Romans entitled *senatus-decreta,* in contradistinction to the *senatus consulta,* which regarded the whole community:[u] and of these (which are not promulgated with the same notoriety as the former) the judges are not bound to take notice, unless they be formally shewn and pleaded. Thus, to shew the distinction, the statute 13 Eliz. c. 10. to prevent spiritual persons from making leases for longer terms than twenty-one years, or three lives, is a public act; it being a rule prescribed to the whole body of spiritual persons in the nation: but an act to enable the bishop of Chester to make a lease to A. B. for sixty years, is an exception to this rule; it concerns only the parties and the bishop's successors; and is therefore a private act.

Public and private acts.

Declaratory or remedial,

Statutes also are either *declaratory* of the common law, or *remedial* of some defects therein. Declaratory, where the old custom of the kingdom is almost fallen into disuse, or become disputable; in which case the parliament has thought proper, *in perpetuum rei testimonium,* and for avoiding all doubts and difficulties, to declare what the common law is and ever hath been. Thus the statute of treasons, 25 Edw. III. cap. 2. doth not make any new species of treasons; but only, for the benefit of the subject, declares and enumerates those several kinds of offence, which before were treason at the common law. Remedial statutes are those which are made to supply such defects, and abridge such superfluities, in the common law, as arise either from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised deter-

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& M. st. 2. c. 2. signifying that it is the second chapter or act, of the second statute, or the laws made in the second session of parliament, in the first year of king William and queen Mary.

[u] Gravin. *Orig.* 1. §. 24.

minations of unlearned (or even learned) judges, or from any other cause whatsoever. And this being done, either by enlarging the common law where it was too narrow and circumscribed, or by restraining it where it was too lax and luxuriant, hath occasioned another subordinate division of remedial acts of parliament into *enlarging* and *restraining* statutes. Thus by the stat. 32 Hen. VIII. c. 28, persons seised of an estate in fee simple in right of their churches, (which extends not to parsons and vicars,) are enabled to make leases, which power they did not possess before, so that this was an *enlarging* statute. The 13 Eliz. c. 10, which afterwards limited that power, may be instanced as a *restraining* statute.[v]

[87]

Enlarging and restraining statutes.

Rules for the construction of statutes.

Secondly, the rules to be observed with regard to the construction of statutes are principally these which follow.

1. Three points to be considered the old law, the mischief and the remedy.

1. There are three points to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy: that is, how the common law stood at the making of the act; what the mischief was, for which the common law did not provide; and what remedy the parliament hath provided to cure this mischief. And it is the business of the judges so to construe the act, as to suppress the mischief and advance the remedy.[w] Let us instance again in the same restraining statute of 13 Eliz. c. 10. By the common law, ecclesiastical corporations might let as long leases as they thought proper: the mischief was, that they let long and unreasonable leases, to the impoverishment of their successors: the remedy applied by the statute was by making void all leases by ecclesiastical bodies for longer terms than three lives or twenty-one years. Now in the construction of this statute it is held, that leases, though for a longer term, if made by a bishop, are not void during the bishop's continuance in his see; or, if made by a dean and chapter, they are not void during the continuance of the

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[v] The instance given by Blackstone of an enlarging statute, the 5 Eliz. c. 11. which converted the clipping the coin from felony to treason, never a very correct illustration, is now no longer in force, having been repealed by the 2 W. 4. c. 34. which (s. 5.) makes this offence once more only a felony. The instance adopted above is fully illustrated by Blackstone himself, 2 Com. 319. or *Principles of Real Prop.* 219.

[w] 3 Rep. 7. Co. Litt. 11. 42.

dean: for the act was made for the benefit and protection of the successor.[x] The mischief is therefore sufficiently suppressed by vacating them after the determination of the interest of the grantors; but the leases, during their conti- [87]
nuance, being not within the mischief, are not within the remedy.

2. Statutes treating of inferiors cannot be extended to superiors.

2. A statute, which treats of things or persons of an inferior rank, cannot by any *general words* be extended to those of a superior. So a statute, treating of "deans, prebendaries, parsons, vicars, *and others having spiritual promotion*," is held not to extend to bishops, though they have spiritual promotion; deans being the highest persons named, and bishops being of a still higher order.[y]

3. Penal statutes must be construed strictly.

3. Penal statutes must be construed strictly. Thus the statute[z] 3 Geo. IV. c. 71, for preventing cruelty to animals, enacted, "that if any person should wantonly and cruelly "beat, abuse or illtreat any horse, mare, gelding, mule, ass, "ox, cow, heifer, steer, sheep, or *other* cattle, such person "should be prosecuted as in the said act mentioned;" and it was held that in the words 'other catttle' '*bulls*' could not "be intended not having been named," and therefore in a subsequent session it was found necessary to make another statute, 5 and 6 Wm. IV. c. 59, s. 2, extending the former act expressly to bulls by name.[a]

4. Statutes against frauds are to be liberally expounded.

4. Statutes against frauds are to be liberally and beneficially expounded. This may seem a contradiction to the last rule; most statutes against frauds being in their consequences penal. But this difference is here to be taken: where the statute acts upon the offender, and inflicts a penalty, as the pillory (which punishment is now confined to the offence of perjury,[b]) or a fine, it is then to be taken strictly: but when the statute acts upon the offence, by set-

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[x] Co. Litt. 45. 3 Rep. 60. 10 Rep. 58.

[y] 2 Rep. 46.

[z] The statutory examples of this note mentioned by Blackstone are no longer in force. They are the 1 Edw. VI. c. 12. and the 14 Geo. II. c. 6. both relating to benefit of clergy, which was altogether abolished by the 7 & 8 Geo. IV. c. 27. by which these statutes were repealed. It has been thought much better throughout this work to illustrate it as much as possible by instances of laws now in force.

[a] *Ex parte* Hill, 3 C. & P. 225.

[b] 56 Geo. 3. c. 138.

ting aside the fraudulent transaction, here it is to be construed liberally. Upon this footing the statute of 13 Eliz. c. 5, which avoids all gifts of goods, &c. made to defraud creditors [89] *and others,* was held to extend by the general words to a gift made to defraud the queen of a forfeiture.[d]

5. Statutes must be construed *ut res magis valeat, quam pereat.*

5. One part of a statute must be so construed by another, that the whole may (if possible) stand: *ut res magis valeat, quam pereat.* As if land be vested in the king and his heirs by act of parliament, saving the right of A: and A. has at that time a lease of it for three years: here A. shall hold it for his term of three years, and afterwards it shall go to the king. For this interpretation furnishes matter for every clause of the statute to work and operate upon. But

6. A saving repugnant to the act is void.

6. A saving, totally repugnant to the body of the act, is void. If therefore an act of parliament vests land in the king and his heirs, saving the right of all persons whatsoever; or vests the land of A. in the king, saving the right of A.: in either of these cases the saving is totally repugnant to the body of the statute, and (if good) would render the statute of no effect or operation; and therefore the saving is void, and the land vests absolutely in the king.[e]

7. In case of difference the common law gives place to the statute.

7. Where the common law and a statute differ, the common law gives place to the statute; and an old statute gives place to a new one. So when two acts of parliament which passed during the same session, and were to come into operation on the same day are repugnant to each other, that which last receives the royal assent must prevail, and be considered *pro tanto* a repeal of the other.[f] And this upon a general principle of universal law, that "*leges posteriores* "*priores contrarias abrogant:*" consonant to which it was laid down by a law of the twelve tables at Rome, that "*quod* "*populus postremum jussit, id jus ratum esto.*" But this is to be understood, only when the latter statute is couched in negative terms, or where its matter is so clearly repugnant, that it necessarily implies a negative. As if a former act says, that a juror upon such a trial shall have twenty pounds a year; and a new statute afterwards enacts, that he shall have twenty marks: here the latter statute, though it does

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[d] 3 Rep. 82.

[e] 1 Rep. 47.

[f] *Rex* v. *Justices of Middlesex,* 2 B. & Ad. 818.

not express, yet necessarily implies a negative, and virtually repeals the former. For if twenty marks be made qualification sufficient, the former statute which requires twenty pounds is at an end.[g] But if both acts be merely affirmative, and [90] the substance such that both may stand together, here the latter does not repeal the former, but they shall both have a concurrent efficacy. If by a former law an offence be indictable at the quarter-sessions, and a latter law makes the same offence indictable at the assizes; here the jurisdiction of the sessions is not taken away, but both have a concurrent jurisdiction, and the offender may be prosecuted at either: unless the new statute subjoins express negative words, as, that the offence shall be indictable at the assizes, *and not elsewhere*.[h]

8. If a statute that repeals another is repealed, the first statute is revived.

8. If a statute, that repeals another, is itself repealed afterwards, the first statute is hereby revived, without any formal words for that purpose. So when the statutes of 26 and 35 Hen. VIII., declaring the king to be the supreme head of the church, were repealed by a statute 1 and 2 Philip and Mary, and this latter statute was afterwards repealed by an act of 1 Eliz. there needed not any express words of revival in queen Elizabeth's statute, but these acts of king Henry were impliedly and virtually revived.[i]

9. Statutes derogatory from the power of subsequent parliaments bind not.

9. Acts of parliament derogatory from the power of subsequent parliaments bind not. So the statute 11 Hen. VII. c. 1, which directs, that no person for assisting a king *de facto* shall be attainted of treason by act of parliament or otherwise, is held to be good only as to common prosecutions for high treason; but will not restrain or clog any parliamentary attainder.[j] Because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledges no superior upon earth, which the prior legislature must have been, if its ordinances could bind a subsequent parliament. And upon the same principle Cicero, in his letters to Atticus, treats with a proper contempt these restraining clauses, which endeavour to tie

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[g] Jenk. Cent. 2. 73.

[h] 11 Rep. 63.

[i] 4 Inst. 325.

[j] 4 Inst. 43.

up the hands of succeeding legislatures. "When you re- [91] "peal the law itself," says he, "you at the same time repeal "the prohibitory clause which guards against such re- "peal."[k]

Statutes impossible to beperformed are of no validity.

10. Lastly, acts of parliament that are impossible to be performed are of no validity: and if there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void. I lay down the rule with these restrictions; though I know it is generally laid down more largely; that acts of parliament contrary to reason are void.[l] But if the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution, that is vested with authority to control it: and the examples usually alleged in support of this sense of the rule do none of them prove, that, where the main object of a statute is unreasonable, the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government. But where some collateral matter arises out of the general words, and happens to be unreasonable; there the judges are in decency to conclude that this consequence was not foreseen by the parliament, and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* disregard it. Thus if an act of parliament gives a man power to try all causes, that arise within his manor of Dale; yet, if a cause should arise in which he himself is party, the act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrel.[m] But, if we could conceive it possible for the parliament to enact, that he should try as well his own causes as those of other persons, there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature or no.

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[k] *Cum lex abrogatur, illud ipsum abrogatur, quo non eam abrogari oporteat. l.* 3. *ep.* 23.

[l] *Day* v. *Savadge*, Hob. 87. 1 Fonbl. on Eq. 26. And see *ante*, p. 33.

[m] 8 Rep. 118.

These are the several grounds of the laws of England: over and above which, equity is also frequently called in to assist, to moderate, and to explain them. What equity is, [92] and how impossible in its very essence to be reduced to stated rules, hath been shewn in the preceding section. I shall therefore only add, that (besides the liberality of sentiment with which our common law judges interpret acts of parliament, and such rules of the unwritten law as are not of a positive kind) there are also peculiar courts of equity established for the benefit of the subject; to detect latent frauds and concealments, which the process of the courts of law is not adapted to reach; to enforce the execution of such matters of trust and confidence, as are binding in conscience, though not cognizable in a court of law; to deliver from such dangers as are owing to misfortune or oversight; and to give a more specific relief, and more adapted to the circumstances of the case, than can always be obtained by the generality of the rules of the positive or common law. This is the business of our courts of equity, which however are only conversant in matters of property. For the freedom of our constitution will not permit, that in criminal cases a power should be lodged in any judge, to construe the law otherwise than according to the letter. This caution, while it admirably protects the public liberty, can never bear hard upon individuals. A man cannot suffer *more* punishment than the law assigns, but he may suffer *less*. The laws cannot be strained by partiality to inflict a penalty beyond what the letter will warrant; but, in cases where the letter induces any apparent hardship, the crown has the power to pardon.

Power of courts of equity to construe statutes.

I cannot finish this general account of the statute law without observing, that the most eminent jurists who have flourished in this country during the last three centuries have recommended the revision and consolidation of this branch of the law. The number of public statutes now in force, together with many expired and repealed statutes and enactments at present printed in the collections in common use, occupy more than thirty closely-printed quarto volumes, containing from 600 to 1200 pages each, and cost-

Consolidation of the statute law recommended.

ing a large sum of money. It is heartily to be desired that some steps may be taken to place the statute law in a more accessible form, and generally to simplify and consolidate its enactments.[b]

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[b] See the report of the Criminal Law Committee, in which a consolidation is strongly recommended, and much information collected on the subject. They came to the conclusion that a revision and alteration of the statute law, founded on the principle of mere reduction and expurgation, would be advantageous and perfectly safe.

SECTION THE FOURTH.

OF THE COUNTRIES SUBJECT TO THE LAWS OF ENGLAND.

[93]

Kingdom of England what it is in strictness.

The kingdom of England, over which our municipal laws have jurisdiction, includes not, by the common law, either Wales, Scotland, or Ireland, or any other part of the king's dominions, except the territory of England only. And yet the civil laws and local customs of this territory do now obtain, in part or in all, with more or less restrictions, in these and many other adjacent countries; of which it will be proper first to take a review, before we consider the kingdom of England itself, the original and proper subject of these laws.

Wales.

Wales had continued independent of England, unconquered and uncultivated, in the primitive pastoral state which Cæsar and Tacitus ascribe to Britain in general, for many centuries; even from the time of the hostile invasions of the Saxons, when the ancient and christian inhabitants of the island retired to those natural intrenchments, for protection from their pagan visitants. But when these invaders themselves were converted to christianity, and settled into regular and potent governments, this retreat of the ancient Britons grew every day narrower; they were over-run by little and little, gradually driven from one fastness to another, and by repeated losses abridged of their wild independence. Very early in our history we find their princes doing homage to the crown of England,[a] till at length in the reign of

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[a] However it is not quite certain that this was so. See *Barrington* on the stat. 74. *Rex* v. *Cowle*, 2 Burr. 850, and 2 *Reeve's Hist. C. L.* 94.

Conquered by Edward the First.

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Edward the first, who may justly be styled the conqueror of Wales, the line of their ancient princes was abolished, and the king of England's eldest son became[b] their titular prince; the territory of Wales being then entirely re-annexed (by a kind of feodal resumption) to the dominion of the crown of England;[c] or, as the statute of Wales expresses it,[d] "*terra* "*Walliæ cum incolis suis, prius regi jure feodali subjecta,* "(of which homage was the sign) *jam in proprietatis domi-* "*nium totaliter et cum integritate conversa est, et coronæ* "*regni Angliæ tanquam pars corporis ejusdem annexa et* "*unita.*" By the same statute very material alterations were made in divers parts of their laws, so as to reduce them nearer to the English standard, especially in the forms of their judicial proceedings: but they still retained very much of their original polity; particularly their rule of inheritance, *viz.* that their lands were divided equally among all the issue male, and did not descend to the eldest son alone. By other subsequent statutes their provincial immunities were still farther abridged: but the finishing stroke to their independency was given by the statute 27 Hen. VIII. c. 26, which at the same time gave the utmost advancement to their civil prosperity, by admitting them to a thorough communication of laws with the subjects of England. Thus were this brave people gradually conquered into the enjoyment of true liberty; being insensibly put upon the same footing, and made fellow-citizens with their conquerors. A generous method of triumph, which the republic of Rome practised with great success; till she reduced all Italy to her obedience, by admitting the vanquished states to partake of the Roman privileges.

and the territory re-annexed to the crown

by the 27 Hen.VIII. c. 26. Wales admitted to a communication of laws with the subjects of England.

Enactments of that statute.

It is enacted by this statute 27 Hen. VIII, 1. That the dominion of Wales shall be for ever united to the kingdom of England. 2. That all Welshmen born shall have the same liberties as other the king's subjects. 3. That lands in Wales shall be inheritable according to the English tenures and rules of descent. 4. That the laws of England, and no other, shall be used in Wales; besides many other regulations of the

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[b] As to the creation of the title of Prince of Wales, see *post*, Ch. IV.

[c] Vaugh. 400.

[d] 12 Edw. I. and not the statute of Rhudlan; 10 Edw. I. as cited by Blackstone.

police of this principality. And the statute 34 & 35 Hen. VIII. c. 26, confirms the same, adds farther regulations, divides it into twelve shires, and, in short, reduces it into the same order in which it stands at this day; differing from the kingdom of England in only a few particulars, and even of these the chief, (that of having courts within itself, independent of the process of Westminster-hall,) has recently been abolished. By the 1 Wm. IV. c. 70, s. 14, it was enacted that from the 12th of October, 1830, all power and jurisdiction of the judges and courts of great sessions, both at law and equity, in the principality of Wales should cease, and that all suits in equity there depending, should be transferred into the court of exchequer, and by s. 13, it is enacted, that the king's writ should be directed and obeyed, and the jurisdiction of the courts of common law and the judges thereof, should extend and be exercised in like manner as the jurisdiction of such courts is now exercised in and over the counties of England. The administration of justice in Wales is thus rendered uniform in every respect with that in England. Wales, since its union with England, returned twenty-seven members to the House of Commons, and by the Reform Act, 2 Wm. IV. c. 45, s. 15, a second knight of the shire was given to the three counties of Carmarthen, Denbigh, and Glamorgan, and by s. 4, Merthyr Tydvil is made a borough returning one member.

By the 1 W. 4, c. 70, the Welsh courts were abolished.

The kingdom of Scotland, notwithstanding the union of the crowns on the accession of their king James VI. to that of England, continued an entirely separate and distinct kingdom for above a century more, though an union had been long projected; which was judged to be the more easy to be done, as both kingdoms were anciently under the same government, and still retained a very great resemblance, though far from an identity, in their laws. By an act of parliament 1 Jac. I. c. 1, it is declared, that these two mighty, famous, and ancient kingdoms were formerly one. And sir Edward Coke observes,[e] how marvellous a conformity there was, not only in the religion and language of the two nations, but also in their ancient laws, the descent of the crown, their parliaments, their titles of nobility, their officers of state and of

Scotland continued a distinct kingdom until the Union justice, their writs, their customs, and even the language of their laws. Upon which account he supposes the common law of each to have been originally the same: especially as their most ancient and authentic book, called *regiam majestatem*, and containing the rules of *their* ancient cammon law, is extremely similar to that of Glanvil, which contains the principles of *ours*, as it stood in the reign of Henry II. And the many diversities, subsisting between the two laws at present, may be well enough accounted for, from a diversity of practice in two large and uncommunicating jurisdictions, and from the acts of two distinct and independent parliaments, which have in many points altered and abrogated the old common law of both kingdoms.

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[e] 4 Inst. 345.

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which was effected in 1707, 5 & 6 Anne.

However, sir Edward Coke, and the politicians of that time, conceived great difficulties in carrying on the projected union: but these were at length overcome, and the great work was happily effected in 1707, 6 Anne; when twenty-five articles of union were agreed to by the parliaments of both nations; the purport of the most considerable being as follows:

The articles of the Union.

1. That on the first of May 1707, and for ever after the kingdoms of England and Scotland shall be united into one kingdom, by the name of Great Britain.

2. The succession to the monarchy of Great Britian shall be the same as was before settled with regard to that of England.

3. The united kingdom shall be represented by one parliament.

4. There shall be a communication of all rights and privileges between the subjects of both kingdoms, except where it is otherwise agreed.

9. When England raises 2,000,000*l.* by a land tax, Scotland shall raise 48,000*l.*

16, 17. The standards of the coin, of weights, and of measures, shall be reduced to those of England, throughout the united kingdoms.

18. The laws relating to trade, customs, and the excise, shall be the same in Scotland as in England. But all the other laws of Scotland shall remain in force; though alterable by the parliament of Great Britain. Yet with this caution;

that laws relating to public policy are alterable at the discretion of the parliament; laws relating to private right are not to be altered but for the evident utility of the people of Scotland.

[97] 22. Sixteen peers are to be chosen to represent the peerage of Scotland in parliament; they are elected only for one parliament: and forty-five members were to sit in the house of commons, which number by the Scotch reform act[g] is extended to fifty-three, being thirty for counties and twenty-three for boroughs.

23. The sixteen peers of Scotland shall have all privileges of parliament: and all peers of Scotland shall be peers of Great Britain, and rank next after those of the same degree at the time of the union,[h] and shall have all privileges of peers, except sitting in the house of lords and voting on the trial of a peer.

Ratified by the 5 Anne, c. 8, which establishes the church of Scotland and the four universities, and renders the acts for the preservation of the church of England perpetual.

These are the principal of the twenty-five articles of union, which are ratified and confirmed by statute 5 Ann. c. 8, in which statute there are also two acts of parliament recited; the one of Scotland, whereby the church of Scotland and also the four universities of that kingdom, are established for ever, and all succeeding sovereigns are to take an oath inviolably to maintain the same; the other of England, 5 Ann. c. 6, whereby the acts of uniformity of 13 Eliz. and 13 Car. II. (except as the same had been altered by parliament at that time) and all other acts then in force for the preservation of the church of England, are declared perpetual; and it is stipulated, that every subsequent king and queen shall take an oath inviolably to maintain the same within England, Ireland, Wales, and the town of Berwick upon Tweed. And it is enacted, that these two acts "shall for ever be observed as fundamental and essential "conditions of the union."

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[g] 2 & 3 W. 4. c. 65. s. 1.

[h] Compare this with the corresponding article of the Irish Union, stated *post*. In consequence of the construction of art. 22, the crown cannot create a new Scotch peerage with the elective right, as it would be an intrusion on the rights of the existing electors; and therefore, says Mr. Justice Coleridge, "I believe Scotch peers are never made except in the cases of the royal family, though extinct peerages are revived and forfeited ones restored." There is also a further difficulty under art. 23, as to the precedence of any new Scotch peer. Under this art. it would seem that he would rank before all peers of the same degree, whether English, Scotch, or Irish, whose patent bears date after the year 1707. The election of Scotch peers is further regulated by the 2 & 3 W. 4. c. 63.

Effect of the union between England and Scotland, how it can be repealed.

Upon these articles and act of union, it is to be observed, 1. That the two kingdoms are now so inseparably united, that nothing can ever disunite them again; except the mutual consent of both, or the successful resistance of either, upon apprehending an infringement of those points which, when they were separate and independent nations, it was mutually stipulated should be "fundamental and essential "conditions of the union."[i] 2. That whatever else may [98] be deemed "fundamental and essential conditions," the preservation of the two churches, of England and Scotland, in the same state that they were in at the time of the union, and the maintenance of the acts of uniformity which establish our common prayer, are expressly declared so to be. 3. That therefore any alteration in the constitution of either of those churches, or in the liturgy of the church of England,

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[i] It may justly be doubted, whether even such an infringement (though a manifest breach of good faith, unless done upon the most pressing necessity) would of itself dissolve the union: for the bare idea of a state, without a power somewhere vested to alter every part of its laws, is the height of political absurdity. The truth seems to be, that in such an *incorporate union* (which is well distinguished by a very learned prelate from a *foederate alliance*, where such an infringement would certainly rescind the compact) the two contracting states are totally annihilated, without any power of a revival; and a third arises from their conjunction, in which all the rights of sovereignty, and particularly that of legislation, must of necessity reside. (See Warburton's alliance, 195.) But the wanton or imprudent exertion of this right would probably raise a very alarming ferment in the minds of individuals; and therefore it is hinted above that such an attempt might *endanger* (though by no means *destroy*) the union.

To illustrate this matter a little farther: an act of parliament to repeal or alter the act of uniformity in England, or to establish episcopacy in Scotland, would doubtless in point of authority be sufficiently valid and binding; and, notwithstanding such an act, the union would continue unbroken. Nay, each of these measures might be safely and honourably pursued, if respectively agreeable to the sentiments of the English church, or the kirk in Scotland. But it should seem neither prudent, nor perhaps consistent with good faith, to venture upon either of those steps, by a spontaneous exertion of the inherent powers of parliament, or at the instance of mere individuals.—So sacred indeed are the laws above-mentioned (for protecting each church and the English liturgy) esteemed, that in the regency acts both of 1751 and 1765 the regents are expressly disabled from assenting to the repeal or alteration of either these, or the act of settlement.

(unless with the consent of the respective churches, collectively or representatively given,) would be an infringement of these "fundamental and essential conditions," and greatly endanger the union. 4. That the municipal laws of Scotland are ordained to be still observed in that part of the island, unless altered by parliament; and they still (with regard to the particulars unaltered)[j] continue in full force. Wherefore the municipal or common laws of England are, generally speaking, of no force or validity in Scotland; and of consequence, in the ensuing volume, we shall have very little occasion to mention, any farther than sometimes by way of illustration, the municipal laws of that part of the united kingdoms. But where Scotland is not intended to be included, the method is expressly to declare that the act does not extend to Scotland.[k]

[99] Berwick-upon Tweed.

The town of Berwick upon Tweed was originally part of the kingdom of Scotland; and, as such, was for a time reduced by king Edward I. into the possession of the crown of England: and, during such its subjection, it received from that prince a charter, which (after its subsequent cession by Edward Balliol, to be for ever united to the crown and realm of England) was confirmed by king Edward III., with some additions; particularly that it should be governed by the laws and usages which it enjoyed during the time of king Alexander, that is, before its reduction by Edward I. Its constitution was new modelled, and put upon an English footing by a charter of king James I.: and all its liberties, franchises, and customs, were confirmed in parliament by the statutes 22 Edw. IV., c. 8, and 2 Jac. 1, c. 28. Though therefore it hath some local peculiarities, derived from the ancient laws of Scotland,[l] yet it is clearly part of the realm of England, being represented by burgesses in the house of commons, and bound by all acts of the British parliament, whether specially named or otherwise. And therefore it was (perhaps superfluously) declared by statute 20 Geo. II. c. 42, that, where England only is mentioned in any act of parliament, the same notwithstanding hath and shall be deemed to comprehend the dominion of Wales and town of Berwick upon Tweed. And though certain of the king's writs or processes of the courts of Westminster do not usually run into Berwick, yet it hath been solemnly adjudged[m] that all prerogative writs (as those of *mandamus*, prohibition, *habeas corpus, certiorari, &c.*) may issue to Berwick as well as to every other of the dominions of the crown of England; and indictments and other local matters arising in the town of Berwick may be tried by a jury of the county of Northumberland, and shall be considered for that purpose a part of this county.[n]

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[j] There have been several important acts passed for improving the administration of justice in Scotland since the time of the union, and more especially since the commentaries of Blackstone were published. Thus trial by jury has been extended to Scotland in civil cases by the 55 Geo. III. c. 42; and this mode of trial has been further explained and improved by several subsequent statutes, 59 Geo. III. c. 35. 6 Geo. IV. c. 120; 1 Wm. IV. c. 69. By the 20 Geo. II. c. 43, heritable jurisdictions were taken away and abolished. By the 10 Geo. IV. c. 55, proceedings for the recovery of small debts may be had in the sheriffs' courts; and by the 7 Wm. IV. and 1 Vict. c. 41, further regulations were made as to the same subject, and for the establishment of circuit courts for the trial of small debt causes by the sheriffs; and by the 1 & 2 Vict. c. 119, various enactments were made as to the constitution, jurisdiction, and form of process of such sheriffs' courts. By the 2 Wm. IV. c. 54. the Court of Exchequer was abolished, and various acts have been passed for regulating and improving the Court of Session. 59 Geo. III. c. 45. 2 Wm. IV. c. 5. But perhaps the most important act, as affecting both England and Scotland, is the 2 Wm. IV. c. 33, amended by the 4 & 5 Wm. IV. c. 82, by which the Courts of Chancery and Exchequer have the power of ordering the service of their process in any suit concerning lands in England and Wales, or money in the funds, or the dividends thereof, to be served on defendants residing in any part of the united kingdom of Great Britain or Ireland, which has been held to apply to Scotland. *Cameron* v. *Cameron*, 2 Myl. & K. 289. *Parker* v. *Lloyd*, 5 Sim. 508. S. C. 2 Myl. & K. 290 n.

[k] Per Lord Mansfield, 2 Burr. 853, 856.

A part of the realm of England.

20 G. II. c. 42, enacts that when England only is mentioned in an act of parliament, Wales and Berwick shall be included.

Ireland.

As to Ireland, that was until very recently a distinct kingdom; though a dependent subordinate kingdom. It was only entitled the dominion or lordship of Ireland,[o] and [100] the king's style was no other than *dominus Hiberniæ*, lord of Ireland, till the thirty-third year of king Henry the eighth; when he assumed the title of king, which is recognised by act of parliament 35 Hen. VIII., c. 3. But, there is this difference between Scotland and Ireland, that the former, as we have seen, differed from England in its municipal laws; but Ireland, on the other hand, even when a distinct kingdom, yet in general agreed in its laws with England. The inhabitants of Ireland are, for the most part, descended from the English, who planted it as a kind of colony, after the conquest of it by king Henry the second; and the laws of England were then received and sworn to by the Irish nation, assembled at the council of Lismore.[p] But Ireland, thus conquered, planted, and governed, until lately still continued in a state of dependence.

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[l] Hale Hist. C. L. 183. 1 Sid. 382. 462. 2 Show. 365.

[m] 2 Cro. Jac. 543. 2 Roll. Abr. 292. Stat. 11 Geo. I. c. 4. 4 Burr. 834.

[n] 5 & 6 Wm. IV. c. 76. s. 109.

[o] *Stat. Hiberniæ.* 14 Hen. III.

Account of the laws of Ireland.

At the time of this conquest the Irish were governed by what they called the Brehon law, so styled from the Irish name of judges, who were denominated Brehons.[q] But king John in the twelfth year of his reign went into Ireland and carried over with him many able sages of the law; and there by his letters patent, in right of the dominion of conquest, is said to have ordained and established that Ireland should be governed by the laws of England:[r] which letters patent sir Edward Coke[s] apprehends to have been there confirmed in parliament. But to this ordinance many of the Irish were averse to conform, and still stuck to their Brehon law: so that both Henry the third[t] and Edward the first[u] were obliged to renew the injunction; and at length in a parliament holden at Kilkenny, 40 Edw. III., under Lionel Duke of Clarence, the then lieutenant of Ireland, the Brehon law was formally abolished, it being unanimously declared to be indeed no law, but a lewd custom crept in of later times. And yet, even in the reign of queen Elizabeth, [101] the wild natives still kept and preserved their Brehon law; which is described[v] to have been "a rule of right unwritten, " but delivered by tradition from one to another, in which " oftentimes there appeared great shew of equity in de-

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[p] Pryn. on 4 Inst. 249.

[q] 4 Inst. 358. Edm. Spenser's state of Ireland. p. 1513. edit. Hughes.

[r] Vaugh. 294. 2 Pryn. Rec. 85. 7 Rep. 23.

[s] 1 Inst. 141.

[t] *A. R.* 30. 1 Rym. *Frod.* 442.

[u] *A. R.* 5.—*pro eo quod leges quibus utuntur Hybernici Deo detestabiles existunt, et omni juri dissonant, adeo quod leges censeri non debeant;—nobis et consilio nostro satis videtur expediens, eisdem utendas concedere leges Anglicanas.* 3 Pryn. Rec. 1218.

[v] Edm. Spenser. *ibid.*

" termining the right between party and party, but in many " things repugnant quite both to God's laws and man's." The latter part of this character is alone ascribed to it, by the laws before cited of Edward the first and his grandson.

What statutes bind Ireland.

But as Ireland was a distinct dominion, and had parliaments of it's own, it is to be observed, that though the immemorial customs, or common law, of England were made the rule of justice in Ireland also, yet no acts of the English parliament, since the twelfth of king John, extended into that kingdom; unless it were specially named, or included under general words, such as, " within any of the king's do- " minions." And this is particularly expressed, and the reason given in the year books:[w] " a tax granted by the par- " liament of England shall not bind those of Ireland, be- " cause they are not summoned to our parliament;" and again, " Ireland hath a parliament of it's own, and maketh " and altereth laws; and our statutes do not bind them, be- " cause they do not send knights to our parliament: but " their persons are the king's subjects, like as the inhabitants " of Calais, Gascoigne, and Guienne, while they continued " under the king's subjection." The general run of laws, enacted by the superior state, are supposed to be calculated for it's own internal government, and do not extend to it's distant dependent countries; which, bearing no part in the legislature, are not therefore in its ordinary and daily contemplation. But, when the sovereign legislative power sees it necessary to extend it's care to any of it's subordinate dominions, and mentions them expressly by name or includes them under general words, there can be no doubt but then they are bound by it's laws.[x]

Original method of passing laws in Ireland.

The original method of passing statutes in Ireland was nearly the same as in England, the chief governor holding [102] parliaments at his pleasure, which enacted such laws as they thought proper.[y] But an ill use being made of this liberty, particularly by lord Gormanstown, deputy-lieutenant in the reign of Edward IV.,[z] a set of statutes were there enacted in the 10 Hen. VII. (Sir Edward Poynings being then

Poynings' laws.

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[w] 20 Hen. VI 8. 2 Ric. III. 12.

[x] Year book, 1 Hen. VII. 3. 7 Rep. 22. Calvin's case.

[y] Irish Stat. 11 Eliz. st. 3. c. 8.

[z] *Ibid.* 10 Hen. VII. c. 23.

lord deputy, whence they are called Poynings' laws) one of which,[a] in order to restrain the power as well of the deputy as the Irish parliament provides, 1. That, before any parliament be summoned or holden, the chief governor and council of Ireland shall certify to the king under the great seal of Ireland the considerations and causes thereof, and the articles of the acts proposed to be passed therein. 2. That after the king, in his council in England, shall have considered, approved, or altered the said acts, or any of them, and certified them back under the great seal of England, and shall have given licence to summon and hold a parliament, then the same shall be summoned and held; and therein the said acts so certified, and no other, shall be proposed, received, or rejected.[b] But as this precluded any law from being proposed, but such as were pre-conceived before the parliament was in being, which occasioned many inconveniences and made frequent dissolutions necessary, it was provided by the statute of Philip and Mary before-cited, that any new propositions might be certified to England in the usual forms, even after the summons and during the session of parliament. By this means however there was nothing left to the parliament in Ireland, but a bare negative or power of rejecting, not of proposing or altering, any law. But the usage was before the union, that bills were often framed in either house, under the denomination of "heads for a bill or bills:" and in that shape they were offered to the consideration of the lord lieutenant and privy council: who upon such parliamentary intimation, or otherwise upon the application of private persons, received and transmitted such heads, or rejected them without any transmission to England. And with regard to Poynings' law in particular, it could not be repealed or suspended, unless the bill for that purpose, before it were certified to England, were approved by both the houses.[c] [103]

But the Irish nation, being excluded from the benefit of the English statutes, were deprived of many good and profitable laws, made for the improvement of the common law:

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[a] Cap. 4. expounded by 3 & 4 Ph. & M. c. 4.

[b] 4 Inst. 353.

[c] Irish Stat. 11 Eliz. st. 3. c. 38.

and the measure of justice in both kingdoms becoming thence no longer uniform, it was therefore enacted by another of Poynings' laws,[d] that all acts of parliament, before made in England, should be of force within the realm of Ireland.[e] But, by the same rule, that no laws made in England, between king John's time and Poynings' law, were then binding in Ireland, it follows that no acts of the English parliament made since the 10 Hen. VII. do now bind the people of Ireland, unless specially named or included under general words.[f] And on the other hand it is equally clear, that where Ireland is particularly named, or is included under general words, they are bound by such acts of parliament.[g]

No acts made since 10 Hen. VII. bind Ireland unless specially named.

Thus we see how extensively the laws of Ireland even before the union, communicated with those of England: and indeed such communication was highly necessary, as the ultimate resort from the courts of justice in Ireland was to those in England; a writ of error (in the nature of an appeal) lying from the king's bench in Ireland at one time to the king's bench in England,[h] as well before the union as after, although this was altered by the statute 23 Geo. III. c. 28,[i] and as the appeal from the chancery in Ireland lay immediately to the house of lords here; indeed, by the statute 6 Geo. I. c. 5., the peers of Ireland had no jurisdiction to affirm or reverse any judgments or decrees whatsoever. But this statute was repealed by the 22 Geo. III. c. 53, and by the 23 Geo. III. c. 28, and the mode of governing Ireland has recently been entirely changed, and during the present century she has no longer been treated as a dependent country, but has in most particulars been admitted in a full participation of the rights and privileges enjoyed by England herself. The first great step toward this important change, was to promote an identification of in-

Present mode of governing Ireland.

Union effected in 1800.

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[d] cap. 22.

[e] 4 Inst. 351.

[f] 12 Rep. 112.

[g] See further as to what acts bind Ireland, Gabbett's Abridg. Irish Stat. Pref. p. xiii.

[h] This was law in the time of Hen. VIII; as appears by the ancient book, intituled, *diversity of courts, c. bank le roy.*

[i] By this statute the appeal from the Irish K. B. was to the Irish House of Lords, and since the union it is to the imperial House of Lords.

terests by effecting a legislative union of the two countries. This measure which had been so successfully carried through as to Wales and Scotland, and had been in these instances productive of consequences so advantageous to all parties, was achieved, but not without heart-burning and difficulty, in the year 1800. The following are the principal articles of this union as contained in the statute of the 39 & 40 of Geo. III. c. 67. (England) and 40 G. III. c. 38. (Ireland).

1. That, from the first day of January, in the year 1801, the kingdoms of Great Britain and Ireland shall be united.

2. That the succession to the crown of the united kingdom shall continue limited and settled as the succession to the crown of the two kingdoms was settled, according to the then existing laws, and to the terms of the union between England and Scotland.

3. That the united kingdom shall be represented in one and the same parliament.

4. That four lords spiritual of Ireland, by rotation of sessions, and twenty-eight lords temporal of Ireland, elected for life by the peers of Ireland, shall be the number to sit and vote on the part of Ireland in the House of Lords of the united kingdom; and that one hundred commoners shall be the number to sit and vote on the part of Ireland in the House of Commons of the united kingdom. And it is further enacted that, any peer of Ireland, not having been previously elected to sit in the House of Lords of the united kingdom, shall be capable of serving in the House of Commons, but so long as he shall be a member of the House of Commons, he shall not be entitled to the privilege of peerage. No creation of an Irish peerage to take place unless three of the peerages of Ireland shall have become extinct, until the number of Irish peers is reduced to one hundred; but the distinct peerage of Ireland is to be kept up to that number, over and above the number of such of the said peers as shall be entitled to an hereditary seat in the House of Lords of the united kingdom. The lords spiritual of Ireland to have rank immediately after the lords spiritual of the like degree of Great Britain; and the persons holding temporal peerages of Ireland, existing at the time of the union, to rank immediately after persons holding peerages of the like de-

grees in Great Britain, subsisting at the time of the union; all peerages of Ireland created after the union to have rank with the peerages of the united kingdom, according to the dates of their creations; and all peerages, both of Great Britain and Ireland, whether subsisting at the time of the union or created subsequently, to be considered as peerages of the united kingdom; and all the peers of Ireland, (including those not elected to sit and vote on the part of Ireland, in the House of Lords of the united kingdom) to enjoy all privileges of peers as fully as the peers of Great Britain; the hereditary right of sitting in the House of Lords, and the privileges depending thereon only excepted.

5. That the churches of England and Ireland, as established at the time of the union, shall henceforth be united into one protestant episcopal church, and that the doctrine, worship, discipline and government, shall be for ever as the same were then by law established for the church of England; and that the continuance and preservation of the said united church shall be deemed an essential and fundamental part of the union.

6. That the people of Great Britain and Ireland shall be on the same footing in respect of trade and navigation, and in all treaties made by his Majesty, his heirs and successors, with any foreign power; and that all prohibitions and bounties on the export of articles, the growth, produce, or manufactures of either country to the other shall cease; and all articles the growth, produce, or manufacture of either country, when exported through the other, are subjected to the same charges as if they had been exported directly from the country of which they were the growth, produce, or manufacture.

7. That the charge arising from the payment of the interest, and the sinking fund for the reduction of the principal of the debt incurred in either kingdom before the union, shall continue to be separately defrayed by Great Britain and Ireland repectively; and that the future expenditure of the united kingdom shall be defrayed in proportion as the parliament shall deem just and reasonable, upon any revision of such proportions at periods not more distant than twenty years, nor less than seven years, from each other.

8. That all laws in force at the time of the union, and all

the courts of civil and ecclesiastical jurisdiction within the respective kingdoms shall remain as, at the time of the union, by law established; subject to such alterations as circumstances may appear to the parliament of the united kingdom to require; provided that all writs of error and appeals which might before the union have been decided by the House of Lords of either kingdom, shall forthwith be finally decided by the House of Lords of the united kingdom.

According to the spirit of this union several acts have been passed by the imperial parliament for the purpose of establishing a complete equality of rights and privileges throughout the whole of the united kingdom. Thus, after much partial and temporary legislation on the subject, a full measure[j] of relief was given to her Majesty's Roman Catholic subjects, which was an especial boon to Ireland, where this persuasion is much more numerously followed than any other. Again, by the Irish Reform Act[k] the number of members to be returned by this country to the House of Commons was increased to one hundred and five, and by the same act the parliamentary franchise was assimilated to that of England. In many other instances the tone and feeling of the country has been elevated, and thus it is to be hoped that Ireland, instead of being the side on which England may be most easily assailed, may become her stoutest bulwark.

Catholic emancipation.

Irish Reform Act.

[105] With regard to the other adjacent islands which are subject to the crown of Great Britain, some of them (as the isle [106] of Wight,[l] of Portland, of Thanet, &c.) are comprised within some neighbouring county, and are therefore to be looked upon as annexed to the mother island, and part of the kingdom of England. But there are others which require a more particular consideration.

Isle of Wight, &c. are comprised within some neighbouring county.

And, first, the isle of Man is a distinct territory from England, and is not governed by our laws: neither doth any act of parliament extend to it, unless it be particularly named therein; and then an act of parliament is binding there.[m] It was formerly a subordinate feudatory kingdom, subject to the

The Isle of Man.

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[j] 10 Geo. IV. c. 7.

[k] 2 & 3 Wm. IV. c. 88. s. 9.

[l] For election purposes the Isle of Wight is severed from Hampshire. 2 & 3 Wm. IV. c. 45, s. 16.

[m] 4 Inst. 284. 2 And. 116.

kings of Norway; then to king John and Henry III. of England; afterward to the kings of Scotland; and then again to the crown of England: and at length we find king Henry IV. claiming the island by right of conquest, and disposing of it to the earl of Northumberland; upon whose attainder it was granted (by the name of the lordship of Man) to Sir John de Stanley by letters patent 7 Henry IV.[m] In his lineal descendants it continued for eight generations, till the death of Ferdinando earl of Derby, *A. D.* 1594: when a controversy arose concerning the inheritance thereof, between his daughters and William his surviving brother: upon which, and a doubt that was started concerning the validity of the original patent,[n] the island was seized into the queen's hands, and afterwards various grants were made of it by king James the first; all which being expired or surrendered, it was granted afresh in 7 Jac. I. to William earl of Derby, and the heirs male of his body, with remainder to his heirs general; which grant was the next year confirmed by act of parliament, with a restraint of the power of alienation by the said earl and his issue male. On the death of James earl of Derby, *A. D.* 1735, the male line of earl William failing, the duke of Atholl succeeded to the island [107] as heir general by a female branch. In the mean time, though the title of king had long been disused, the earls of Derby, as lords of Man, had maintained a sort of royal authority therein; by assenting or dissenting to laws, and exercising an appellate jurisdiction. Yet, though no English writ, or process from the courts of Westminster, was of any authority in Man, an appeal lay from a decree of the lord of the island to the king of Great Britain in council.[o] But the distinct jurisdiction of this little subordinate royalty being found inconvenient for the purposes of public justice, and for the revenue, (it affording a commodious asylum for debtors, outlaws, and smugglers,) authority was given to the treasury by statute 12 Geo. 1. c. 28, to purchase the interest of the then proprietors for the use of the crown: which purchase was at length completed in the year 1765, and confirmed by statutes 5 Geo. III. c. 26 and 39, and 45 Geo. III.

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[m] Selden. tit. hon. 1. 3.

[n] Camden. Eliz. *A. D.* 1594.

[o] 1 P. Wms. 329.

c. 123, whereby the whole island and all its dependencies, so granted as aforesaid, (except the landed property of the Atholl family, their manorial rights and emoluments, and the patronage of the bishoprick[p] and other ecclesiastical benefices,) are unalienably vested in the crown, and subjected to the regulations of the British excise and customs, and further by the 6 Geo. IV. c. 34, the rights reserved to the Duke of Atholl by the stat. 5 Geo. III. c. 26, and 45 Geo. III. c. 123, were also purchased, and are now also vested in the crown.

Jersey, Guernsey, &c.

The islands of Jersey, Guernsey, Sark, Alderney, and their appendages, were parcel of the duchy of Normandy, and were united to the crown of England by the first princes of the Norman line. They are governed by their own laws, which are for the most part the ducal customs of Normandy, being collected in an ancient book of very great authority, entituled, *le grand coustumier*. The king's writ, or process from the courts of Westminster, (except the suit is immediately for the king,[q] and writs of mandamus and prohibition which are issued to every dominion of the crown[r]) is there of no force; but his commission is. They are not bound by common acts of our parliaments, unless particularly named.[s] All causes are originally determined by their own officers, the bailiffs and jurats of the islands; but an appeal lies from them to the king and council, in the last resort.

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Colonial possessions.

Besides these adjacent islands, our more distant plantations in America, and elsewhere, are also in some respect subject to the English laws. Plantations or colonies, in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother country; or where, when already cultivated, they have been either gained by conquest, or ceded to us by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations. But there is a difference between these two species of colonies, with respect to the laws by which they are bound. For it hath been held,[t] that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject,[u] are immediately there in force. But this must be understood with very many and very great restrictions. Such colonists carry[v] with them only so much of the English law, as is applicable to their own situation and the condition of an infant colony; such, for instance, as the general rules of inheritance, and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue, (such especially as are inforced by penalties) the bankrupt laws, the mortmain acts, the poor and game laws, the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force.[w] What shall be admitted and what rejected, at what times, and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject to the revision and control of the king in council: the whole of their constitution being also liable to be newmodelled and reformed by the general superintending power of the legislature in the mother country. But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the ancient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country.[x] Our American plantations [109] are principally of this latter sort, being obtained in the last two centuries either by right of conquest and driving out the natives (with what natural justice I shall not at present inquire) or by treaties. And therefore the common law of England, as such, has no allowance or authority there; they being no part of the mother country, but distinct (though dependent) dominions. They are subject however to the control of the parliament; though (like Ireland, Man, and the rest) not bound by any acts of parliament, unless particularly named.

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[p] The bishoprick of Man, or Sodor and Man, was formerly within the province of Canterbury, but annexed to that of York by statute 33 Hen. VIII. c. 31. By the 6 & 7 Wm. IV. c. 77, reciting that the Ecclesiastical commissioners had recommended (among other things) that the sees of Carlisle and Sodor and Man should be united, and that it was expedient that such recommendation should be carried into effect as conveniently as might be, authorized the commissioners to lay schemes before the king in council for carrying into effect their recommendations. However, by the 1 & 2 Vict. c. 30, so much of the 6 & 7 Wm. IV. as relates to the see of Sodor and Man is repealed; and by s. 3, it is enacted that no ecclesiastical dignity or benefice shall be held in commendam by any bishop of Sodor and Man. Since the 6 Geo. IV. c. 34, the patronage of this bishoprick is no longer in the Duke of Atholl, but in the crown.

[q] 2 Hale, ch. 42, 43.

[r] *Rex* v. *Cowle*, 2 Burr. 856.

[s] 4 Inst. 286.

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[t] 1 Salk. 411. 666.

[u] 2 P. Wms. 75.

[v] 1 Chalm. Op. 195. *Rex* v. *Inhabitants of Brampton*, 10 East, 288. *Campbell* v. *Hall*, Cowp. 204.

[w] *Attorney General* v. *Stuart*, 2 Mer. 143. *Dawes* v. *Painter*, Freem. 75.

Of three sorts, according to Blackstone, but alteration as to this.

With respect to their interior polity, our colonies are divided by Blackstone into three sorts. 1. Provincial establishments, the constitutions of which depend on the respective commissions issued by the crown to the governors, and the instructions which usually accompany those commissions; under the authority of which, provincial assemblies are constituted, with the power of making local ordinances, not repugnant to the laws of England.[y] 2. Proprietary governments, granted out by the crown to individuals, in the nature of feudatory principalities, with all the inferior regalities, and subordinate powers of legislation, which formerly belonged to the owners of counties palatine: yet still with these express conditions, that the ends for which the grant was made be substantially pursued, and that nothing be attempted which may derogate from the sovereignty of the mother-country. 3. Charter governments, in the nature of civil corporations, with the power of making bye-laws for their own interior regulation, not contrary to the laws of England; and with such rights and authorities as are specially given them in their several charters of incorporation. Colonies reduced to one class. But almost all the present colonies are now of the class above described as provincial establishments, there being at present no proprietary government, nor, with the exception of Sierra Leone, if that be an exception, is there any charter government among the colonial dependencies of Great Britain.[z] The form of government in most of the existing colonies is borrowed from that of England. They have a governor named by the king, (or when proprietary colonies existed by the proprietor,) who is his representative or deputy. They have courts of justice of their own, from whose decisions an appeal lies to the king and council here in England. Their general assemblies [110] which are their house of commons, together with their council of state being their upper house, with the concurrence of the king or his representative the governor, make laws suited to their own emergencies. But it is particularly declared by statute 7 & 8 Wm. III. c. 22, which was repealed by the 6 Geo. 4, c. 105, but re-enacted by the 3 & 4 Wm. 4, c. 59, s. 56, that all laws, bye-laws, usages, and customs, which shall be in practice in any of the plantations, repugnant to any law, made or to be made in this kingdom relative to the said plantations, shall be utterly void and of none effect. And, because several of the colonies had claimed the sole and exclusive right of imposing taxes upon themselves, the statute 6 Geo. III. c. 12, expressly declared, that all his majesty's colonies and plantations in America have been, are, and of right ought to be, subordinate to and dependent upon the imperial crown and parliament of Great Britain; who have full power and authority to make laws and statutes of sufficient validity to bind the colonies and people of America, subjects of the crown of Great Britain, in all cases whatsoever. However, in the year 1782, by statute 22 Geo. III. c. 46, his majesty was empowered to conclude a peace with the United States, and for that purpose, to repeal, or to suspend, the operation of any acts of parliament *so far as they related to the said colonies.* Accordingly a peace was soon after concluded, and the independence which the abovementioned colonies had before declared was allowed to them; so that now they are as much independent of, and unconnected with, Great Britain, as any other foreign nation. And by the 23 Geo. III. c. 39, certain powers are given to the king for the better carrying on trade and commerce between England and the United States.

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[x] 7 Rep. 17. Calvin's case. Show. Parl. C. 31. But see *Campbell* v. *Hall*, Cowp. Rep. 204. in which *a great and elaborate argument was delivered by Lord Mansfield, in the court of king's bench on this subject*. See also *Blankard* v. *Gally*, 2 Salk. 411.

[y] The question as to how far a colonial assembly can make laws repugnant to the laws of England has been much discussed of late with reference to the recent disturbances in Lower Canada. By the 1 Vict. c. 9, s. 1, the legislature of that province was suspended; and by s. 3, the governor, with the consent of the majority of his council, was authorized to make such laws or ordinances as the previous legislature of Lower Canada was empowered to make, provided that it should not be lawful by any such law or ordinance to repeal, suspend, or alter any provision of any act of Great Britain or the United Kingdom. Under this authority the governor (the Earl of Durham), by an ordinance dated the 28th of June, 1838, very considerably altered and suspended the English law of high treason. The ordinance was disallowed by the Queen on the 16th of August, 1838, and a partial act of indemnity was passed. 1 & 2 Vict. c. 112.

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[z] Clark on Colonial Law, p. 20.

If the crown give a new constitution to a conquered or ceded colony, and it be provided that a representative assembly shall be summoned among the inhabitants of the colony, with the power of making laws for its interior government, it has been decided that the crown cannot afterwards exercise with respect to such colony its former right of legislation.[a] But every colony at all periods of its existence is subject as part of the British dominions to the legislative authority of the British parliament, by whose power its existing laws may in all cases be either wholly or in part repealed, and new laws or a new constitution be at pleasure imposed. And this is true with regard to those conquered or ceded colonies that have obtained from the king in council legislatures of their own, and where the power of the crown to make laws has ceased.[b]

These are the several parts of the dominions of the crown of Great Britain, in which the municipal laws of England are not of force or authority, merely *as* the municipal laws of England. Most of them have probably copied the spirit of their own law from this original; but then it receives its obligation, and authoritative force, from being the law of the country.

[111] **Foreign dominions.**

As to any foreign dominions which may belong to the person of the king by hereditary descent, by purchase, or other acquisition, as the territory of Hanover, and any other property in Germany; as these never in anywise appertained to the crown of these kingdoms, and have since the accession of her present majesty to the throne devolved on the male line in the person of the Duke of Cumberland, they are entirely unconnected with the laws of England, and do not communicate with this nation in any respect whatsoever. The English legislature had wisely remarked the inconveniences that had formerly resulted from dominions on the continent of Europe; from the Norman territory which William the conqueror brought with him, and held in conjunction with the English throne; and from Anjou, and its appendages, which fell to Henry the second by hereditary descent. They had seen the nation engaged for near four hundred years together in ruinous wars for defence of these foreign dominions; till, happily for this country, they were lost under the reign of Henry the sixth. They observed that, from that time, the maritime interests of England were better understood and more closely pursued: that, in consequence of this attention, the nation, as soon as she had rested from her civil wars, began at this period to flourish all at once; and became much more considerable in Europe, than when her princes were possessed of a larger territory, and her councils distracted by foreign interests. This experience and these considerations gave birth to a conditional clause in the act[c] of settlement, which vested the crown in her present majesty's illustrious house, "that in case the crown and imperial dignity of this realm "shall hereafter come to any person not being a native of "this kingdom of England, this nation shall not be obliged "to engage in any war for the defence of any dominions or "territories which do not belong to the crown of England, "without consent of parliament."

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[a] *Campbell* v. *Hall*, Cowp. 204. Clark on Colonial Law, 10.

[b] Clark, 11, and note 1.

Kingdom of England what it comprehends. We come now to consider the kingdom of England in particular, the direct and immediate subject of those laws, concerning which we are to treat in the ensuing work. And this comprehends not only Wales and Berwick, of which enough has been already said, but also part of the sea. The main or high seas are part of the realm of England, [112] for thereon our courts of admiralty have jurisdiction, but **High seas and admiralty jurisdiction.** they are not subject to the common law.[d] This main sea begins at the low-water-mark. But between the high-water-mark, and the low-water-mark, where the sea ebbs and flows, the common law and the admiralty have *divisum imperium*, an alternate jurisdiction; one upon the water, when it is full sea; the other upon the land when it is an ebb.[e]

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[c] Stat. 12 & 13 Wm. 3, c. 3.

[d] Co. Litt. 260.

High and low-water-mark.

The territory of England is liable to two divisions; the one ecclesiastical, the other civil.

The territory of England is divided into ecclesiastical and civil.

1. The ecclesiastical division is, primarily, into two provinces, those of Canterbury and York. A province is the circuit of an archbishop's jurisdiction. Each province contains divers dioceses, or sees of suffragan bishops; whereof Canterbury includes twenty-one, and York three: besides the bishoprick of the isle of Man,[f] which was annexed to the province of York by king Henry VIII. Every diocese is divided into archdeaconries, whereof there are sixty in all; each archdeaconry into rural deaneries, which are the circuit of the archdeacon's and rural dean's jurisdiction, of whom hereafter; and every deanery is divided into parishes.[g]

The ecclesiastical provinces of Canterbury and York.

A parish is that circuit of ground which is committed to the charge of one parson, or vicar, or other minister having cure of souls therein. These districts are computed to be near ten thousand in number.[h] How ancient the division of parishes is, may at present be difficult to ascertain; for it seems to be agreed on all hands, that in the early ages of christianity in this island, parishes were unknown, or at least signified the same that a diocese does now. There was then no appropriation of ecclesiastical dues to any particular church; but every man was at liberty to contribute his tithes to whatever priest or church he pleased, provided only that he did it to some; or, if he made no special appointment or appropriation thereof, they were paid into the hands of the bishop, whose duty it was to distribute them among the clergy and for other pious purposes, according to his own discretion.

Parishes.

Mr. Camden[i] says, England was divided into parishes by archbishop Honorius about the year 630. Sir Henry

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[e] Finch. L. 78.

[f] As to this bishoprick, see *ante*, p. 101, n. p. This ecclesiastical division is not altered by the 6 & 7 Wm. IV. c. 77, as to which see *post*, chap. XI.

[g] Co. Litt. 94.

[h] Gibson's *Britain*.

[i] In his Britannia.

Hobart[j] lays it down, that parishes were first erected by the council of Lateran, which was held A.D. 1179. Each [112] widely differing from the other, and both of them perhaps from the truth; which will probably be found in the medium between the two extremes. For Mr. Selden has clearly shewn[k] that the clergy lived in common without any division of parishes, long after the time mentioned by Camden. And it appears from the Saxon laws, that parishes were in being long before the date of that council of Lateran, to which they are ascribed by Hobart.

We find the distinction of parishes, nay, even of mother-churches, so early as in the laws of king Edgar, about the year 970. Before that time the consecration of tithes was in general *arbitrary*, that is, every man paid his own (as was before observed) to what church or parish he pleased. But this being liable to be attended with either fraud, or at least caprice, in the persons paying; and with either jealousies or mean compliances in such as were competitors for receiving them: it was now ordered by the law of king Edgar,[l] that "*dentur omnes decimæ primariæ ecclesiæ ad quam parochia* "*pertinet.*" However, if any thane, or great lord, had a church within his own demesnes, distinct from the mother-church, in the nature of a private-chapel; then, provided such church had a cemetery or consecrated place of burial belonging to it, he might allot one-third of his tithes for the maintenance of the officiating minister: but, if it had no cemetery, the thane must himself have maintained his chaplain by some other means; for in such case all his tithes were ordained to be paid to the *primariæ ecclesiæ* or mother-church.[m]

This proves that the kingdom was then generally divided into parishes; which division happened probably not all at once, but by degrees. For it seems pretty clear and certain, that the boundaries of parishes were originally ascertained by those of a manor or manors; since it very seldom happens that a manor extends itself over more parishes than one, though [113] there are often many manors in one parish. The lords, as christianity spread itself, began to build churches upon their own demesnes or wastes, to accommodate their tenants in one or two adjoining lordships; and, in order to have divine service regularly performed therein, obliged all their tenants to appropriate their tithes to the maintenance of the one officiating minister, instead of leaving them at liberty to distribute them among the clergy of the diocese in general; and this tract of land, the tithes whereof were so appropriated, formed a distinct parish. Which will well enough account for the frequent intermixture of parishes one with another. For, if a lord had a parcel of land detached from the main of his estate, but not sufficient to form a parish of itself, it was natural for him to endow his newly erected church with the tithes of those disjointed lands, especially if no church was then built in any lordship adjoining to those outlying parcels.

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[j] Hob. 296.

[k] Of tithes, c. 9.

[l] c. 1.

[m] *Ibid.* c. 2. See also the laws of king Canute, c. 11, about the year 1030.

Thus parishes were gradually formed, and parish churches endowed with the tithes that arose within the circuit assigned. But some lands, either because they were in the hands of irreligious and careless owners, or were situate in forest and desert places, or for other now unsearchable reasons, were never united to any parish, and therefore continue to this day extra-parochial: and their tithes are now by immemorial custom payable to the king instead of the bishop, in trust and confidence that he will distribute them for the general good of the church:[n] yet extra-parochial wastes and marsh lands, when improved and drained are by the stat. 17 G. 2, c. 37, to be assessed to all parochial rates in the parish next adjoining. And thus much for the ecclesiastical division of this kingdom.

2. Civil division of the territory of England.

2. The civil division of the territory of England is into counties, of those counties into hundreds, of those hundreds into tithings or towns. Which division, as it now stands, seems to owe its original to king Alfred,[o] who to prevent the

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[n] 2 Inst. 647; 2 Rep. 44. Cro. Eliz. 512. It is to be observed that tithes are now commuted to a rent-charge, 6 & 7 Wm. IV. c. 71.

[o] Flet. 1. 47. This the laws of King Edward the Confessor, c. 20, very justly entitle, "*summa et maxima* "*securitas, per quam omnes statu firmissimo sustimentu ;—quæ hoc modo* "*fiebut, quod sub decennali fidejussione* "*debebant esse universi, &c.*"

[114] rapines and disorders which formerly prevailed in the realm, instituted tithings, so called from the Saxon, because ten freeholders, with their families, composed one. These all dwelt together, and were sureties or free pledges to the king, for the good behaviour of each other; and if any offence was committed in their district, they were bound to have the offender forthcoming.[p] And therefore anciently no man was suffered to abide in England above forty days, unless he were enrolled in some tithing or decenuary.[q] One of the principal inhabitants of the tithing is annually appointed to preside over the rest, being called the tithing-man, the head-borough (words which speak their own etymology,) and in some countries the borsholder, or borough's-ealder, being supposed the discretest man in the borough, town, or tithing.[r]

Tithings. Tithings, towns, or vills, are of the same signification in law; and are said to have had, each of them, originally a church, and celebration of divine service, sacraments, and burials:[s] though that seems to be rather an ecclesiastical, than a civil, distinction. The word *town* or *vill* is indeed, by the alteration of times and language, now become a generical term, comprehending under it the several species of cities, boroughs, and common towns. A city is a town incorporated, which is or hath been the see of a bishop; and though the bishoprick be dissolved, as at Westminster, yet still it remaineth a city.[t] A borough is now understood to be a town, either corporate or not, that sendeth burgesses to parliament.[u] Other towns there are, to the number Sir Edward Coke says[v] of 8803, which are neither cities nor boroughs; some of which have the privileges of markets, and others not; but both are equally towns in law. To several of these towns there are small appendages belonging, called hamlets, [115] which are taken notice of in the statute of Exeter[w] which makes frequent mention of entire vills, demi-vills, and hamlets. Entire vills, Sir Henry Spelman[x] conjectures to have consisted of ten freemen, or frank-pledges, demi-vills of five, and hamlets of less than five. These little collections of houses are sometimes under the same administration as the town itself, sometimes governed by separate officers; in which last case they are, to some purposes in law, looked upon as distinct townships. These towns, as was before hinted, contained each originally but one parish, and one tithing; though many of them now, by the increase of inhabitants, are divided into several parishes and tithings; and sometimes where there is but one parish, there are two or more vills or tithings.

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[p] Mirr. c. 1. §. 3.

[q] Mr. Carte is of opinion that this system was known long before the time of Alfred (Carte's Hist. vol. i. p. 368.), but Alfred certainly regulated and improved it.

[r] Finch, L. 8.

[s] 1 Inst. 115.

[t] Co. Litt. 109. But see Harg. note, and 1 Wood Inst. 302.

[u] Litt. §. 164.

[v] 1 Inst. 116.

[w] 14 Edw. I.

[x] Gloss. 274.

Hundreds.

As ten families of freeholders made up a town or tithing, so ten tithings composed a superior division, called a hundred as consisting of ten times ten families. The hundred is governed by an high constable, or bailiff, and formerly there was regularly held in it the hundred court for the trial of causes, though now fallen into disuse. In some of the more northern counties these hundreds are called wapentakes.[y]

The subdivision of hundreds into tithings seems to be most peculiarly the invention of Alfred:[z] the institution of hundreds themselves he rather introduced than invented; for they seem to have obtained in Denmark:[a] and we find that in France a regulation of this sort was made above two hundred years before, set on foot by Clotharius and Childebert, with a view of obliging each district to answer for the robberies committed in its own division. These divisions, were, in that country, as well military as civil, and each contained a hundred freemen, who were subject to an officer called the *centenarius*, a number of which *centenarii* were themselves [116] subject to a superior officer called the count or *comes*[b]. And indeed something like this institution of hundreds may be traced back as far as the ancient Germans, from whom were derived both the Franks, who became masters of Gaul, and the Saxons, who settled in England: for both the thing and the name, as a territorial assemblage of personages, from which afterwards the territory itself might probably receive its denomination, were well known to that warlike people. "*Centeni ex singulis pagis sunt, idque ipsum inter suos* "*vocantur; et quod primo numerus fuit, jam nomen et honor* "*est.*"[c]

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[y] Seld. in Fortesc. c. 24.

[z] But see *Hallam's Mid. Ages*, ch. viii p. 1, and see *ante*, p. 110, n. q.

[a] Seld. tit. *Hon.* 2. 5. 3.

[b] Montesq. Sp. L. 30. 17.

Counties.

An indefinite number of these hundreds make up a county or shire. Shire is a Saxon word, signifying a division: but a county, *comitatus*, is plainly derived from *comes*, the count, of the franks; that is, the earl, or alderman (as the Saxons called him) of the shire, to whom the government of it was entrusted. This he usually exercised by his deputy, still called in Latin *vice-comes*, and in English the sheriff, shrieve, or shire-reeve, signifying the officer of the shire, upon whom, by process of time, the civil administration of it is now totally devolved. In some counties there is an intermediate division between the shire and the hundreds, as lathes in Kent, and rapes in Sussex, each of them containing about three or four hundreds a-piece. These had formerly their lathe-reeves, and rape-reeves, acting in subordination to the shire-reeve. Where a county is divided into *three* of these intermediate jurisdictions, they are called tithings,[d] which were anciently governed by a tithing-reeve. These tithings still subsist in the large county of York, where, by an easy corruption, they are denominated ridings; the north, the east, and the west-riding. The number of counties in England and Wales have been different at different times: at present they are forty in England, and twelve in Wales.

Counties palatine.

Three of those counties, Chester, Durham, and Lancaster, are called counties palatine. The two former are such by prescription or immemorial custom, or at least, as old as [117] the Norman conquest.[e] The latter was created by king Edward III. in favour of Henry Plantagenet, first earl and then duke of Lancaster[f] whose heiress being married to John of Gaunt, the king's son, the franchise was greatly enlarged and confirmed in parliament[g] to honour John of Gaunt himself whom, on the death of his father-in-law, the king had also created duke of Lancaster.[h] Counties palatine are so called

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[c] Tacit. de Morib. German. 6.

[d] L. L. Edw. c. 34.

[e] Seld. tit. *Hon*. 2. 5. 8.

[f] Pat. 25 Edw. III. pl. 1. m. 18; Seld. *Ibid;* Sandford's Gen. Hist. 112; 4 Inst. 204.

[g] Cart. 36 Edw. III. n. 9.

[h] Pat. 51 Edw. III. m. 33; Plowd. 215; 7 Rym. 138.

a palatio, because the owners thereof, the earl of Chester, the bishop of Durham, and the duke of Lancaster, had in those counties *jura regalia*, as fully as the king hath in his palace; *regalem potestatem in omnibus*, as Bracton expresses it.[j] They might pardon treasons, murders, and felonies; they appointed all judges and justices of the peace; all writs and indictments ran in their names, as in other counties in the king's; and all offences were said to be done against their peace, and not, as in other places, *contra pacem domini regis*.[k] And indeed by the ancient law, in all peculiar jurisdictions, offences were said to be done against his peace in whose court they were tried; in a court-leet, *contra pacem domini;* in the court of a corporation, *contra pacem ballivorum;* in the sheriff's court or tourn, *contra pacem vicecomitis*.[l] These palatine privileges (so similar to the regal independent jurisdictions usurped by the great barons on the continent, during the weak and infant state of the first feodal kingdoms in Europe),[m] were, in all probability, originally granted to the counties of Chester and Durham, because they bordered upon inimical countries, Wales and Scotland, in order that the inhabitants, having justice administered at home, might not be obliged to go out of the country and leave it open to the enemy's incursions; and that the owners being encouraged by so large an authority, might be the more watchful in its defence. And upon this account also there were formerly two other counties palatine, Pembrokeshire and Hexhamshire, [118] the latter now united with Northumberland; but these were abolished by parliament, the former in 27 Hen. VIII., the latter in 14 Eliz. And in 27 Hen. VIII., likewise, the powers before mentioned of owners of counties palatine were abridged, the reason for their continuance in a manner ceasing; though still all writs are witnessed in their names, and all forfeitures for treason by the common law accrue to them.[n]

Of these three, the county of Durham has been of late years the only one remaining in the hands of a subject; for the earldom of Chester, as Camden testifies, was united to the crown by Henry III., and has ever since given title to the king's eldest son. And the county palatine, or duchy of Lancaster, was the property of Henry of Bolingbroke, the son of John of Gaunt, at the time when he wrested the crown from king Richard II., and assumed the style of king Henry IV. But he was too prudent to suffer this to be united to the crown, lest, if he lost one, he should lose the other also; for as Plowden[o] and Sir Edward Coke[p] observe "he knew he had the duchy of Lancaster by sure and indefeasible title, but that his title to the crown was not so assured: for that after the decease of Richard II., the right of the crown was in the heir of Lionel, duke of Clarence, second son of Edward III., John of Gaunt, father to this Henry IV., being but the fourth son." And therefore he procured an act of parliament, in the first year of his reign, ordaining that the duchy of Lancaster, and all other his hereditary estates, with all their royalties and franchises, should remain to him and his heirs for ever; and should remain, descend, be administered, and governed, in like manner, as if he never had attained the regal dignity; and thus they descended to his son and grandson, Henry V. and Henry VI., many new territories and privileges being annexed to the duchy, by the former.[q] Henry VI. being attainted in [119] 1 Edward IV., this duchy was declared in parliament to have become forfeited to the crown[r] and at the same time an act was made to incorporate the duchy of Lancaster, to continue the county palatine, (which otherwise might have determined by the attainder)[s] and to make the same parcel of the duchy; and further, to vest the whole in king Edward IV., and his heirs kings of England for ever; but under a separate guiding and governance from the other inheritances of the crown. And in 1 Hen. VII., another act was made to resume such parts of the duchy lands as had been dismembered from it in the reign of Edward IV., and to vest the inheritance of the whole in the king and his heirs for ever, as amply and largely, and in like manner, form and condition, separate from the crown of England, and possession of the same, as the three Henrys and Edward IV., or any of them, had and held the same.[t]

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[j] L. 3. c. 8. §. 4.

[k] 4 Inst. 204.

[l] Seld. in Heng. Magn. c. 2.

[m] Robertson, Cha. V. i. 60.

[n] 4 Inst. 205.

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[o] 215.

[p] 4 Inst. 205.

[q] Parl. 2 Hen. V. n. 30; 3 Hen. V. n. 15.

[r] 1 Ventr. 155.

[s] 1 Ventr. 157.

Alterations made of late as in counties palatine

But very considerable alterations have recently been made in two of the three counties palatine that remain. By the statute 10 Geo. IV. & 1 Wm. IV. c. 70, s. 13, the jurisdiction of her Majesty's courts at Westminster is extended to the county palatine of Chester, and by s. 14, the jurisdiction of the court of session of such county palatine ceased, and the assizes are now held at Chester, and the administration of justice is carried on in all respects as in any other county of England. By the statute 6 Wm. IV. c. 19, s. 1, the palatine jurisdiction and power theretofore vested in the bishop of Durham is separated from the bishoprick, and all forfeitures and *jura regalia* are transferred to the king, his heirs, and successors, but without prejudice to the jurisdiction of the courts of the county palatine; but by s. 2, the county court is abolished.[u] And, by the Uniformity of Process Act, 2 Wm. IV. c. 32, s. 21, it is expressly provided that nothing in that act should abridge, alter, or affect the franchise and jurisdiction of either of the counties palatine of Durham or Lancaster. And by the 4 & 5 Wm. IV. c. 62, the jurisdiction of the palatine court of Lancaster is extended by compelling the attendance of witnesses and enforcing execution out of the former limits.[v]

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[t] Some have entertained an opinion (Plowd. 220. l. 2; Lamb, *Archaion*, 233, 4 Inst. 206.) that, by this act, the right of the duchy vested only in the *natural*, and not in the *political* person of king Henry VII. as formerly in that of Henry IV.; and was descendible to his natural heirs, independent of the succession to the crown. And if this notion were well founded, it might have become a very curious question, at the time of the Revolution in 1668, in whom the right of the duchy remained after King James's abdication, and previous to the attainder of the pretended Prince of Wales. But it is observable, that in the same act the duchy of Cornwall is also vested in King Henry VII. and his heirs; which could never be intended in any event to be separated from the inheritance of the crown. And indeed it seems to have been understood, very early after the statute of Henry VII. that the duchy of Lancaster was by no means thereby made a separate inheritance from the rest of the royal patrimony, since it descended with the crown to the half-blood in the instances of Queen Mary and Queen Elizabeth, which it could not have done as the estate of a mere duke of Lancaster, in the common course of legal descent. The better opinion, therefore, seems to be that of those judges who held (*Plowd.* 221,) that, notwithstanding the statute of Hen. VII. (which was only an act of resumption) the duchy still remained as established by the act of Edward IV. separate from the other possessions of the crown in order and government, but united in point of inheritance.

[u] A bill was brought in in the session of 1836 to abolish the palatine jurisdiction of Durham (printed in 11 *Legal Obs.* 466), but it was altered to the modified shape above-mentioned.

Isle of Ely. The isle of Ely is not a county palatine, though sometimes erroneously called so, but only a royal franchise; the bishop having, by grant of king Henry the first *jura regalia* within the isle of Ely, whereby he exercises a jurisdiction over all causes, as well criminal as civil.[w]

[120] **Counties corporate, as London, York, &c.** There are also counties *corporate*, which are certain cities and towns, some with more, some with less territory annexed to them; to which, out of special grace and favour, the kings of England have granted the privilege to be counties of themselves, and not to be comprised in any other county, but to be governed by their own sheriffs and other magistrates, so that no officers of the county at large have any power to intermeddle therein. Such are London, York, Bristol, Norwich, Coventry, and many others.[x]

And thus much of the countries subject to the laws of England.

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[v] There has recently (1835) been a report by commissioners as to the county court of Lancaster.

[w] 4 Inst. 220.

[x] They are all mentioned in the statute 3 Geo. I. c. 5.

CHAPTER THE FIRST.

OF THE ABSOLUTE RIGHTS OF INDIVIDUALS.

Municipal law being a rule of civil conduct, commanding what is right and prohibiting what is wrong;[a] it follows, that the primary and principal objects of the law are rights and wrongs.

[122] **Rights divisible into rights of persons and rights of things.**

Rights are liable to another subdivision: being either, first, those which concern and are annexed to the persons of men, and are then called *jura personarum* or the *rights of persons;* or they are, secondly, such as a man may acquire over external objects, or things unconnected with his person, which are styled *jura rerum* or the *rights of things.*

The rights of persons.

We are in the present work to consider the *rights of persons;* with the means of acquiring and losing them.[b]

[123] **Rights of persons of two sorts.**

Now the rights of persons that are commanded to be observed by the municipal law are of two sorts: first, such as are due *from* every citizen, which are usually called civil *duties;* and, secondly, such as belong *to* him, which is the more popular acceptation of *rights* or *jura*. Both may indeed be comprised in this latter division; for, as all social duties are of a relative nature, at the same time that they are due *from* one man, or set of men, they must also be due *to* another. But I apprehend it will be more clear and easy, to consider many of them as duties required from, rather than as rights belonging to, particular persons. Thus, for instance, allegiance is usually, and therefore most easily, considered as the duty of the people, and protection as the duty of the magistrate; and yet they are, reciprocally, the rights as well as duties of each other. Allegiance is the right of the magistrate, and protection the right of the people.

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[a] See *ante* p. 35.

[b] The rights of things are treated of in "the *Principles of Real Property,* "according to the text of Blackstone, by the present writer.

Persons are either natural or artificial.

Persons also are divided by the law into either natural persons, or artificial. Natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic.

Rights of persons are either absolute or relative.

The rights of persons considered in their natural capacities are also of two sorts, absolute, and relative. Absolute, which are such as appertain and belong to particular men, merely as individuals or single persons: relative, which are incident to them as members of society, and standing in various relations to each other. The first, that is, absolute rights, will be the subject of the present chapter.

Absolute rights.

By the absolute *rights* of individuals we mean those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it. But with regard to the absolute *duties*, which man is bound [124] to perform considered as a mere individual, it is not to be expected that any human municipal law should at all explain or enforce them. For the end and intent of such laws being only to regulate the behaviour of mankind, as they are members of society, and stand in various relations to each other, they have consequently no concern with any other but social or relative duties. Let a man therefore be ever so abandoned in his principles, or vicious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws. But if he makes his vices public, though they be such as seem principally to affect himself, (as drunkenness, or the like) they then become, by the bad example they set, of pernicious effects to society; and therefore it is then the business of human laws to correct them. Here the circumstance of publication is what alters the nature of the case. *Public* sobriety is a relative duty, and therefore enjoined by our laws; *private* sobriety is an absolute duty, which, whether it be performed or not, human tribunals can never know; and therefore they can never enforce it by any civil sanction. But with respect to *rights*, the case is different. Human laws define and enforce as well those rights which belong to a man considered as an individual, as those which belong to him considered as related to others.

The principal aim of society is to protect individuals.

For the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature; but which could not be preserved in peace without that mutual assistance and intercourse, which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals. Such rights as are social and *relative* result from, and are posterior to, the formation of states and societies: so that to maintain and regulate these, is clearly a subsequent consideration. And therefore the principal view of human laws is, or ought always to be, to explain, protect and enforce such rights as are absolute, which in themselves are few and simple; and then such rights [125] as are relative, which, arising from a variety of connexions, will be far more numerous and more complicated. These will take up a greater space in any code of laws, and hence may appear to be more attended to, though in reality they are not, than the rights of the former kind. Let us therefore proceed to examine how far all laws ought, and how far the laws of England actually do, take notice of these absolute rights, and provide for their lasting security.

Natural liberty, what it is.

The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind. This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature; being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he

Partially given upon entering society.

Political or civil liberty, what it is.

endued him with the faculty of free-will. But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish. And this species of legal obedience and conformity is infinitely more desirable than that wild and savage liberty which is sacrificed to obtain it. For no man, that considers a moment, would wish to retain the absolute and uncontrolled power of doing whatever he pleases: the consequence of which is, that every other man would also have the same power; and then there would be no security to individuals in any of the enjoyments of life. Political therefore, or civil liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public.[b] Hence we may collect that the law, which restrains a man [126] from doing mischief to his fellow-citizens, though it diminishes the natural, increases the civil liberty of mankind; but that every wanton and causeless restraint of the will of the subject, whether practised by a monarch, a nobility, or a popular assembly, is a degree of tyranny: nay, that even laws themselves, whether made with or without our consent, if they regulate and constrain our conduct in matters of mere indifference, without any good end in view, are regulations destructive of liberty: whereas, if any public advantage can arise from observing such precepts, the control of our private inclinations, in one or two particular points, will conduce to preserve our general freedom in others of more importance; by supporting that state of society, which alone can secure our independence. Thus the statute of king Edward IV.,[c] which forbad the fine gentlemen of those times (under the degree of a lord) to wear pikes upon their shoes or boots of more than two inches in length, was a law that savoured of oppression; because, however ridiculous the fashion then in use might appear, the restraining it by pecuniary penalties could serve no purpose of common utility. But the statute of king Charles II.,[d] which prescribed a thing seemingly as indifferent, (a dress for the dead, who were all ordered to be buried in woollen) was a law consistent with public liberty; for according to the opinion of that day, it encouraged the staple trade, on which in great measure depends the universal good of the nation. So that laws, when prudently framed, are by no means subversive but rather introductive of liberty; for (as Mr. Locke has well observed)[e] where there is no law there is no freedom. But then, on the other hand, that constitution or frame of government, that system of laws, is alone calculated to maintain civil liberty, which leaves the subject entire master of his own conduct, except in those points wherein the public good requires some direction or restraint.

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[b] *Facultas ejus, quod cuique facere libet, nisi quid jure prohibetur. Inst.* 1. 3. 1.

[c] 3 Edw. IV. c. 5.

Political liberty flourishes greatly in England.

The idea and practice of this political or civil liberty flourish in their highest vigour in these kingdoms, where it falls little short of perfection, and can only be lost or destroyed by the folly or demerits of its owner: the legislature, [127] and of course the laws of England, being peculiarly adapted to the preservation of this inestimable blessing even in the meanest subject. Very different from the constitutions of many other states, on the continent of Europe, and from the genius of the imperial law; which in general are calculated to vest an arbitrary and despotic power, of controlling the actions of the subject, in the prince, or in a few grandees. And this spirit of liberty is so deeply implanted in our constitution, and rooted even in our very soil, that a slave or a negro, the moment he lands in England, falls under the protection of the laws, and so far becomes a freeman:[f] though the master's right to his service may *possibly* still continue. And acting on this the spirit of our constitution, slavery has been finally abolished throughout the British dominions by an act of the imperial parliament,[g] and has at last been extinguished not only in name but in substance by the legislatures of those colonies where it formerly existed.[h]

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[d] 30 Car. II. st. 1. c. 3. now repealed by the 54 Geo. III. c. 108.

[e] On Gov. p. 2. §. 57.

[f] Salk. 666. See ch. 14.

[g] 3 & 4 Wm. 4. c. 73.

[h] Slavery was abolished in all the West India Colonies on the 1st of August, 1838. See *Mirror of Parl.* Sess. 1838, p. 5519.

The absolute rights of every Englishman, (which, taken in a political and extensive sense, are usually called their liberties) as they are founded on nature and reason, so they are coeval with our form of government; though subject at times to fluctuate and change: their establishment (excellent as it is) being still human. At some times we have seen them depressed by overbearing and tyrannical princes; at others so luxuriant as even to tend to anarchy, a worse state than tyranny itself, as any government is better than none at all.[i] But the vigour of our free constitution has always delivered the nation from these embarrassments: and, as soon as the convulsions consequent on the struggle have been over, the balance of our rights and liberties has settled to its proper level; and their fundamental articles have been from time to time asserted in parliament, as often as they were thought to be in danger.

Magna Charta. John.

First, by the great charter of liberties, which was obtained, sword in hand, from king John, and afterwards, with some alterations, confirmed in parliament by king Henry the third, his son. Which charter contained very few new grants; but, as sir Edward Coke[j] observes, was for the most part declaratory of the principal grounds of the fundamental [128] laws of England. Afterwards by the statute called *confirmatio cartarum*,[k] whereby the great charter is directed to be allowed as the common law; all judgments contrary to it are declared void; copies of it are ordered to be sent to all cathedral churches, and read twice a year to the people; and sentence of excommunication is directed to be as constantly denounced against all those that by word, deed, or counsel, act contrary thereto, or in any degree infringe it. Next, by a multitude of subsequent corroborating statutes (sir Edward Coke, I think, reckons thirty-two)[l] from the first Edward to Henry the fourth. Then, after a long interval, by *the petition of right*, which was a parliamentary declaration of the liberties of the people, assented to by king Charles the first in the beginning of his reign. Which was closely followed by the still more ample concessions made by that unhappy prince to his parliament, before the

And *confirmatio cartarum.* Edward I.

Petition of right. Charles I.

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[i] See 2 Wils. 292. *acc.*

[j] 2 Inst. proëm.

[k] 25 Edw. I.

[l] 2 Inst. proëm.

fatal rupture between them; and by the many salutary laws, particularly the *habeas corpus* act, passed under Charles the second. To these succeeded *the bill of rights*, or declaration delivered by the lords and commons to the prince and princess of Orange, 13 February 1688; and afterwards enacted in parliament, when they became king and queen: which declaration concludes in these remarkable words; "and they do claim, demand, and insist upon, all and singular the premises, as their undoubted rights and liberties." "And the act of parliament itself[m] recognizes all and "singular the rights and liberties asserted and claimed in "the said declaration to be the true, ancient, and indubitable "rights of the people of this kingdom." These liberties were again asserted at the commencement of the present century, in the *act of settlement*,[n] whereby the crown was limited to her present majesty's illustrious house: and some new provisions were added, at the same fortunate æra, for better securing our religion, laws, and liberties; which the statute declares to be "the birthright of the people of "England," according to the ancient doctrine of the common law.[o] And lastly, we have gained in the reign of the late king that which may well be called the second great charter of liberties, the reform act,[p] of which I shall hereafter have to give a particular account, whereby, to use the words of its preamble, "divers abuses which had long "prevailed in the choice of members to serve in the commons house of parliament were corrected, many inconsiderable places were deprived of the right of returning "members, and such privilege was granted to large populous and wealthy towns, and the elective franchise was "extended to many of his majesty's subjects who had not "heretofore enjoyed the same."

Habeas Corpus Act, Charles II.

Bill of rights Wm.&Mary.

Act of settlement. Wm. III.

Reform Act, Wm. IV.

[129]

Thus much for the *declaration* of our rights and liberties. The rights themselves, thus defined by these several statutes, consist in a number of private immunities; which will appear, from what has been premised, to be indeed no other, than either that *residuum* of natural liberty, which is not required by the laws of society to be sacrificed to public convenience; or else those civil privileges, which society hath engaged to provide, in lieu of the natural liberties so given up by individuals. These therefore were formerly, either by inheritance or purchase, the rights of all mankind; but, in most other countries of the world being now more or less debased and destroyed, they at present may be said to remain, in a peculiar and emphatical manner, the rights of the people of England. And these may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty, and the right of private property: because, as there is no other known method of compulsion, or of abridging man's natural free will, but by an infringement or diminution of one or other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense.

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[m] 1 W. & M. st. 2. c. 2.

[n] 12 & 13 W. III. c. 2.

[o] Plowd. 55.

[p] 2 & 3 W. IV. c. 45.

Rights of persons further to be reduced to three: 1, the right of personal security; 2, the right of personal liberty, and 3, the right of private property.

I. The right of personal security for life, when this begins.

I. The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.

1. Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion or otherwise, killeth it in her womb; or if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter.[q] But the modern law doth not [130] look upon this offence in quite so atrocious a light, but merely as a heinous misdemeanor.[r]

An infant *in ventre sa mere*, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate made to it. It may have a guardian assigned to it;[s] and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born.[t] And in this point the civil law agrees with ours.[u]

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[q] *Si aliquis mulierem pregnantem percusserit, vel ei venenum dederit, per quod fecerit abortivam; si puerperium jam formatum fuerit, et maxime si fuerit animatum, facit homicidium.* Bracton. *l.* 3. *c.* 21.

[r] 3 Inst. 50. As to endeavouring to procure abortion, see 1 Vict. c. 85. s 5.

[s] Stat. 12 Car. II. c. 24.

2. for limbs.

2. A man's limbs (by which for the present we only understand those members which may be useful to him in sight, and the loss of which alone amounts to mayhem by the common law) are also the gift of the wise Creator, to enable him to protect himself from external injuries in a state of nature. To these therefore he has a natural inherent right; and they cannot be wantonly destroyed or disabled without a manifest breach of civil liberty.

Duress, what it is.

[131]

Both the life and limbs of a man are of such high value, in the estimation of the law of England, that it pardons even homicide if committed *se defendendo*, or in order to preserve them. For whatever is done by a man, to save either life or member, is looked upon as done upon the highest necessity and compulsion. Therefore if a man through fear of death or mayhem is prevailed upon to execute a deed, or do any other legal act; these, though accompanied with all other the requisite solemnities, may be afterwards avoided, if forced upon him by a well-grounded apprehension of losing his life, or even his limbs, in case of his non-compliance.[v] And the same is also a sufficient excuse for the commission of many misdemeanors. The constraint a man is under in these circumstances is called in law *duress*, from the Latin *dureties*, of which there are two sorts; duress of imprisonment, where a man actually loses his liberty, of which we shall presently speak: and duress *per minas*, where the hardship is only threatened and impending, which is that we are now discoursing of. Duress *per minas* is either for fear of loss of life, or else for fear of mayhem, or loss of limb. And this fear must be upon sufficient reason; "*non*," as Bracton expresses it, "*suspicio cujuslibet vani et* "*meticulosi hominis, sed talis qui possit cadere in virum con*"*stantem; talis enim debet esse metus, qui in se contineat* "*vitæ periculum, aut corporis cruciatum*."[w] A fear of battery, or being beaten, though never so well grounded, is no duress: neither is the fear of having one's house burned, or one's goods taken away and destroyed; because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages:[x] but no suitable atonement can be made for the loss of life or limb. And the indulgence shown to a man under this, the principal, sort of duress, the fear of losing his life or limbs, agrees also with that maxim of the civil law; *ignoscitur ei qui sanguinem suum qualtier qualiter redemptum voluit.*[y]

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[t] Stat. 10 & 11 W. III. c16.

[u] *Qui in utero sunt, in jure civili intelliguntur in rerum natura esse, cum de eorum commodo agatur. Ff.* 1. 5. 26.

[v] 2 Inst. 483.

[w] *l.* 2. *c.* 5.

The law not only regards life and member, and protects every man in the enjoyment of them, but also furnishes him with everything necessary for their support. For there is no man so indigent or wretched, but he may demand a supply sufficient for all the necessities of life from the more opulent part of the community, by means of the several statutes enacted for the relief of the poor, although this right has of late been somewhat limited.[z] A humane provision; yet, though dictated by the principles of society, discountenanced by the Roman laws. For the edicts of the emperor Constantine commanding the public to maintain the children of those who were unable to provide for them, in order to prevent the murder and exposure of infants, an institution founded on the same principle as our foundling hospitals, though comprised in the Theodosian code,[a] were rejected in Justinian's collection.

[132] **The rights of life and limb can only be determined by death whether civil or natural.**

These rights, of life and member, can only be determined by the death of the person; which was formerly accounted to be either a civil or natural death. The civil death commenced, if any man was banished or abjured the realm[b] by the process of the common law, or entered into religion; that is, went into a monastery, and became there a monk professed: in which cases he was absolutely dead in law, and his next heir should have his estate. For, such banished man was entirely cut off from society; and such a monk, upon his profession, renounced solemnly all secular concerns: and besides, as the popish clergy claimed an exemption from the duties of civil life and the commands of the temporal magistrate, the genius of the English laws would not suffer those persons to enjoy the benefits of society, who secluded themselves from it, and refused to submit to its regulations.[d] A monk was therefore accounted *civiliter mortuus*, and when he entered into religion might, like other dying men, make his testament and executors; or, if he made none, the ordinary might grant administration to his next of kin, as if he were actually dead intestate. And such executors and administrators had the same power, and might bring the same actions for debts due *to* the religious, and were liable for the same actions for those due *from* him, as if he were naturally deceased.[e] Nay, so far has this principle been carried, that when one was bound in a bond to an abbot and his successors, and afterwards made his executors and professed himself a monk of the same abbey, and in process of time was himself made abbot thereof; here the law gave him, in the capacity of abbot, an action of debt against his own executors to recover the money due.[f] In short, a monk or religious was so effectually dead in law, that a lease made even to a third person, during the life (generally) of one who afterwards became a monk, determined by such his entry into religion: for which reason leases, and other conveyances for life, were usually made to have and to hold for the term of one's *natural* life.[g] But, even in the times of popery, the law of England [133] took no cognizance of *profession* in any foreign country, because the fact could not be tried in our courts;[h] and therefore, since the reformation, this disability is held to be abolished:[i] as is also the disability of banishment, consequent upon abjuration, by statute 21 Jac. I. c. 28.[j]

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[x] 2 Inst. 483.

[y] *Ff.* 48. 21. 1. It may here be observed, that the obtaining a valuable security from a person by duress, is not stealing in the eye of the law, and this offence, in two instances, accompanied with much atrocity, has escaped all adequate punishment. *Phipoe's* case, 2 Leach, C. C. p. 774. *Rex* v. *Edmunds*, 6 Car. & Pay. 619.

[z] See 4 & 5 W. IV. c. 76.

[a] *l.* 11. *c.* 27.

[b] Co. Litt. 133.

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[d] This was also a rule in the feodal law, *l.* 2. *t.* 21. *desiit esse miles seculi, qui factus est miles Christi; nec beneficium pertinet ad eum qui non debet gerere officium.*

[e] Litt. §. 200.

[f] Co. Litt. 133.

[g] 2 Rep, 48. Co. Litt. 132.

[h] Co. Litt. 132.

[i] 1 Salk. 162.

[j] One species of civil death, says Mr. Christian, may still exist in this

How life may be forfeited.

This natural life being, as was before observed, the immediate donation of the great Creator, cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority. Yet nevertheless it may, by the divine permission, be frequently forfeited for the breach of those laws of society, which are enforced by the sanction of capital punishments. Whenever the *constitution* of a state vests in any man, or body of men, a power of destroying at pleasure, without the direction of laws, the lives or members of the subject, such constitution is in the highest degree tyrannical: and whenever any *laws* direct such destruction for light and trivial causes, such laws are likewise tyrannical, though in an inferior degree: because here the subject is aware of the danger he is exposed to, and may by prudent caution provide against it. The statute law of England does therefore very seldom, more especially of late years,[k] and the common law does never inflict any punishment extending to life or limb, unless upon the highest necessity: and the constitution is an utter stranger to any arbitrary power of killing or maiming the subject without express warrant of law. “*Nullus liber homo*,” says the great charter[l], “*aliquo modo destruatur, nisi per legale judicium* “*parium suorum aut per legem terrae*.” Which words, “*aliquo modo destruatur*,” according to Sir Edward Coke,[m]

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country, that is, where a man by act of parliament is attainted of treason or felony, and saving his life, is banished for ever; this Lord Coke declares to be a civil death. Co. Litt. 133.

[k] The severity of the statute law has recently been much mitigated by greatly lessening the number of crimes for which the punishment of death is inflicted. See the 7 & 8 Geo. IV. cc. 27, 28, 29, 30, 31, 32; 9 Geo. IV. c. 31. and 1 Vict. cc. 84, 89, and 91. The effect of these acts has been to change the criminal code of England from one of the most sanguinary to one of the mildest of the civilized world, and hitherto with the happiest results in lessening crime. The only crimes now punishable with death are, 1. treason; 2. murder; 3. rape and unnatural offences; 6. setting fire to any king's ship or stores; 7. the causing injury to life, with intent to commit murder; 8. burglary, accompanied with an attempt at murder; 9. robbery, accompanied with stabbing or wounding; 10. setting fire to a dwelling-house, any person being therein; 11. setting fire to, casting away, or otherwise destroying ships, with intent to murder any person; 12. exhibiting false lights with intent to bring ships in danger; 13. piracy, accompanied by stabbing, &c.; 14. riotous destruction of buildings.

[l] c. 29.

[m] 2 Inst. 48.

include a prohibition not only of *killing*, and *maiming*, but also of *torturing* (to which our laws are strangers) and of every oppression by colour of an illegal authority. And it is enacted by the statute 5 Edw. III. c. 9, that no man shall be fore-judged of life or limb, contrary to the great charter [134] and the law of the land: and again, by statute 28 Edw. III. c. 3, that no man shall be put to death, without being brought to answer by due process of law.

3. From corporal insults.

3. Besides those limbs and members that may be necessary to a man, in order to defend himself or annoy his enemy, the rest of his person or body is also entitled, by the same natural right, to security from the corporal insults of menaces, assaults, beating, and wounding; though such insults amount not to destruction of life or member.

4. From practices against health.

4. The preservation of a man's health from such practices as may prejudice or annoy it; and

5. and against reputation.

5. The security of his reputation or good name from the arts of detraction and slander, are rights to which every man is entitled, by reason and natural justice; since without these it is impossible to have the perfect enjoyment of any other advantage or right. But these three last articles (being of much less importance than those which have gone before, and those which are yet to come) it will suffice to have barely mentioned among the rights of persons.

II. The right of personal liberty.

II. Next to personal security, the law of England regards, asserts, and preserves the personal liberty of individuals. This personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law. Concerning which we may make the same observations as upon the preceding article; that it is a right strictly natural; that the laws of England have never abridged it without sufficient cause; and, that in this kingdom it cannot ever be abridged at the mere discretion of the magistrate, without the explicit permission of the laws. Here again the language of the great charter[m] is, that no freeman shall be taken or [135] imprisoned, but by the lawful judgment of his equals, or by the law of the land. And many subsequent old statutes[n]

***Magna Charta,* John.**

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[m] c. 29.

[n] 5 Edw. III. c. 9. 25 Edw. III. st. 5. c. 4. 21 Edw. III. c. 3.

petition of right. Car. I.

Habeas Corpus act. Car. II.

The abolition of imprisonment for debt. 1 & 2 Victoria.

expressly direct, that no man shall be taken or imprisoned by suggestion or petition to the king or his council, unless it be by legal indictment, or the process of the common law. By the petition of right, 3 Car. I, it is enacted, that no freeman shall be imprisoned or detained without cause shewn, to which he may make answer according to law. By 16 Car. I. c. 10, if any person be restrained of his liberty by order or decree of any illegal court, or by command of the king's majesty in person, or by warrant of the council board, or of any of the privy council: he shall, upon demand of his council, have a writ of *habeas corpus*, to bring his body before the court of king's bench or common pleas; who shall determine whether the cause of his commitment be just, and thereupon do as to justice shall appertain. And by 31 Car. II. c. 2, commonly called the *habeas corpus act*, the methods of obtaining this writ are so plainly pointed out and enforced, that, so long as this statute remains unimpeached, no subject of England can be long detained in prison, except in those cases in which the law requires and justifies such detainer. And, lest this act should be evaded by demanding unreasonable bail, or sureties for the prisoner's appearance, it is declared by 1 W. & M. st. 2, c. 2, that excessive bail ought not to be required. Further, by an act of her present majesty's reign, the 1 & 2 Vict. c. 110, the personal liberty of her subjects has been still more fully secured and extended by the abolition of all imprisonment for debt on mesne process, except where fraud can be shown.

Which is of great importance to the public.

Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper, (as in some foreign countries is daily practised by the crown[o]) there would soon be an end of all other rights and immunities. Some have thought, that unjust attacks, even upon life, or property, [136] at the arbitrary will of the magistrate, are less dangerous to the commonwealth, than such as are made upon the personal liberty of the subject. To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom: but confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. And yet sometimes, when the state is in real danger, even this may be a necessary measure. But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great, as to render this measure expedient: for it is the parliament only, or legislative power, that, whenever it sees proper, can authorize the crown, by suspending the *habeas corpus* act for a short and limited time, to imprison suspected persons without giving any reason for so doing; as the senate of Rome was wont to have recourse to a dictator, a magistrate of absolute authority, when they judged the republic in any imminent danger. The decree of the senate, which usually preceded the nomination of this magistrate, "*dent operam consules,* "*ne quid respublica detrimenti capiat,*" was called the *senatus consultum ultimæ necessitatis.* In like manner this experiment ought only to be tried in cases of extreme emergency; and in these the nation parts with it's liberty for a while in order to preserve it for ever. The effect of a suspension of the *habeas corpus* act is to prevent persons who are committed upon certain charges from being bailed, tried, or discharged, for the time of the suspension, except under the provisions of the suspending act, leaving, however, to the magistrate, or person committing, all the responsibility attending an illegal imprisonment. It is very common therefore to pass acts of indemnity subsequently for the protection of those who either could not defend themselves in an action for false imprisonment, without making improper disclosures of the information on which they acted, or who have done acts not strictly defensible at law, though justified by the necessity of the moment.[p]

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[o] I have been assured, says Blackstone, upon good authority, that, during the mild administration of cardinal Fleury, above 54,000 *lettres de cachet* were issued, upon the single ground of the famous bulle *unigenitus*. But the crown has no such power in France at the present day, although it exists in Russia and Austria, and other despotic governments.

When the right of personal liberty should be suspended.

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[p] Mr. Justice Coleridge, who cites 57 Geo. III. c. 3 & 55, as instances of suspending acts, and 58 Geo. III. c. 6, as one of an indemnifying act.

What is imprisonment. The confinement of the person, in any wise, is an imprisonment. So that the keeping a man against his will in a private house, putting him in the stocks, arresting or forcibly detaining him in the street is an imprisonment.[q] And the law so much discourages unlawful confinement, that if a man is under *duress of imprisonment*, which we before explained to mean a compulsion by an illegal restraint of liberty, until he seals a bond or the like; he may allege this duress, and avoid the extorted bond. But if a man be law- [137] fully imprisoned, and either to procure his discharge, or on any other fair account, seals a bond or a deed, this is not by duress of imprisonment, and he is not at liberty to avoid it.[r] To make imprisonment lawful, it must either be by process from the courts of judicature, or by warrant from some legal officer having authority to commit to prison; which warrant must be in writing under the hand and seal of the magistrate, and express the causes of the commitment, in order to be examined into (if necessary) upon a *habeas corpus*. If there be no cause expressed, the gaoler is not bound to detain the prisoner.[s] For the law judges in this respect, saith Sir Edward Coke, like Festus the Roman governor; that it is unreasonable to send a prisoner, and not to signify withal the crimes alleged against him.

Every Englishman may continue to abide in England. A natural and regular consequence of this personal liberty, is, that every Englishman may claim a right to abide in his own country so long as he pleases; and not to be driven from it unless by the sentence of the law. The king indeed, by his royal prerogative, may issue out his writ *ne exeat regno*, and prohibit any of his subjects from going into foreign parts without licence.[t] This may be necessary for the public service and safeguard of the commonwealth. But no power on earth, except the authority of parliament, can send any subject of England *out of* the land against his will; no, not even a criminal. For exile, and transportation, are punishments at present unknown to the common law; and, whenever the latter is now inflicted, it is either by the choice of the criminal himself to escape a capital punishment, or else by the express direction of some modern act of parliament.[v] To this purpose the great charter[w] declares, that no freeman shall be banished, unless by the judgment of his peers, or by the law of the land. And by the *habeas corpus* act, 31 Car. II. c. 2, (that second *magna charta*, and stable bulwark of our liberties) it is enacted, that no subject of this realm, who is an inhabitant of England, Wales, or Berwick, shall be sent prisoner into Scotland, Ireland, Jersey, Guernsey, or places beyond the seas; (where they cannot have the full benefit and protection of the common law) but that all such imprisonments shall be illegal; that the person, who shall dare to commit another contrary to this law, shall be disabled from bearing any office, shall incur the penalty of a *præmunire*, and be incapable of receiving the king's pardon: and the party suffering shall also have his private action against the person committing, and all his aiders, advisers and abettors, and shall recover treble costs; besides his damages, which no jury shall assess at less than five hundred pounds. *Magna Charta,* John. [138]

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[q] 2 Inst. 589.

[r] *Ibid.* 482.

[s] 2 Inst. 52, 53.

[t] F. N. B. 85.

The law is in this respect so benignly and liberally construed for the benefit of the subject, that, though *within* the realm the king may command the attendance and service of all his liegemen, yet he cannot send any man *out of* the realm, even upon the public service; excepting sailors and soldiers, the nature of whose employment necessarily implies an exception: he cannot even constitute a man lord deputy or lieutenant of Ireland against his will, nor make him a foreign ambassador.[x] For this might in reality be no more than an honourable exile.

III. The right of property.

III. The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. The original of private property is probably founded in nature, but certainly the modifications under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from society: and are some of those civil advantages, in exchange for which every individual has resigned a part of his natural liberty. The laws of England are therefore, in point of honour and justice, extremely watchful in ascertaining and protecting this right. Upon this principle the great charter[y] has declared that no freeman shall be disseised, or divested, of his freehold, or of his liberties, or free [139] customs, but by the judgment of his peers, or by the law of the land. And by a variety of ancient statutes[z] it is enacted, that no man's lands or goods shall be seised into the king's hands, against the great charter, and the law of the land; and that no man shall be disinherited, nor put out of his franchises or freehold, unless he be duly brought to answer, and be forejudged by course of law; and if any thing be done to the contrary, it shall be redressed, and holden for none.

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[v] The punishment of transportation has been regulated by a very recent statute, 1 & 2 Vict. c. 90.

[w] c. 29.

[x] 2 Inst. 46.

The regard which the law pays to the right of property.

So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does, is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.[a]

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[y] c. 29.

[z] 5 Edw. III. c. 9. 25 Edw. III. st. 5. c. 4. 28 Edw. III. c. 3.

Aids or taxes can only be imposed by the common consent.

[140] Nor is this the only instance in which the law of the land has postponed even public necessity to the sacred and inviolable rights of private property. For no subject of England can be constrained to pay any aids or taxes, even for the defence of the realm or the support of government, but such as are imposed by his own consent, or that of his representatives in parliament. By the statute 25 Edward I. c. 5 and 6, it is provided, that the king shall not take any aids or tasks, but by the common assent of the realm. And what that common assent is, is more fully explained by 34 Edw. I. st. 4, c. 1, which[b] enacts, that no talliage or aid shall be taken without the assent of the archbishops, bishops, earls, barons, knights, burgesses, and other freemen of the land: and again, by 14 Edw. III. st. 2, c. 1, the prelates, earls, barons, and commons, citizens, burgesses, and merchants shall not be charged to make any aid, if it be not by the common assent of the great men and commons in parliament. And as this fundamental law had been shamefully evaded under many succeeding princes, by compulsive loans, and benevolences extorted without a real and voluntary consent, it was made an article in the petition of right 3 Car. I. that no man shall be compelled to yield any gift, loan, or benevolence, tax, or such like charge, without common consent by act of parliament. And, lastly, by the statute 1 W. & M. st. 2, c. 2, it is declared, that levying money for or to the use of the crown, by pretence of prerogative, without grant of parliament; or for longer time, or in other manner, than the same is or shall be granted; is illegal.

In the three preceding articles we have taken a short view of the principal absolute rights which appertain to every Englishman. But in vain would these rights be declared, ascertained, and protected by the dead letter of the laws, if [141] the constitution had provided no other method to secure their actual enjoyment. It has therefore established certain other auxiliary subordinate rights of the subject, which serve principally as outworks or barriers, to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property. These are,

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[a] As to the construction of acts of this nature, see *Vauxhall Company* v. *Earl Spencer*, 2 Madd. 356. Jac. 64; *Lister* v. *Lobley*, 7 Adol. & E. 124; *Blakemore* v. *Glamorganshire Canal Company*, 1 Myl. & K. 162; and *Edwards* v. *Grand Junction Railway Company*, 1 Keen, 583.

[b] See the introduction to the great charter, *(edit. Oxon.) sub anno* 1297; wherein it is shewn that this statute *de talliagio non concedendo* supposed to have been made in 34 Edw. I. is in reality nothing more than a sort of translation into Latin of the *confirmatio cartarum*, 25 Edw. I. which was originally published in the Norman language.

The constitution has established certain auxiliary rights which are,

1. The constitution of parliament.

1. The constitution, powers, and privileges of parliament, of which I shall treat at large in the ensuing chapter.

2. The limitation of the king's prerogative.

2. The limitation of the king's prerogative, by bounds, so certain and notorious, that it is impossible he should either mistake or legally exceed them without the consent of the people. Of this also I shall treat in it's proper place. The former of these keeps the legislative power in due health and vigour, so as to make it improbable that laws should be enacted destructive of general liberty: the latter is a guard upon the executive power, by restraining it from acting either beyond or in contradiction to the laws, that are framed and established by the other.

3. The power of applying to courts of justice.

3. A third subordinate right of every Englishman is that of applying to the courts of justice for redress of injuries. Since the law is in England the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein. The emphatical words of *magna carta*,[c] spoken in the person of the king, who in judgment of law (says sir Edward Coke[d]) is ever present and repeating them in all his courts, are these; *nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam:* "and therefore every "subject," continues the same learned author, "for injury "done to him *in bonis, in terris, vel persona*, by any other "subject, be he ecclesiastical or temporal, without any ex"ception, may take his remedy by the course of the law, "and have justice and right for the injury done to him, "freely without sale, fully without any denial, and speedily "without delay." It were endless to enumerate all the

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[c] c. 29.

[d] 2 Inst. 55.

affirmative acts of parliament, wherein justice is directed to be done according to the law of the land: and what that law is, every subject knows, or may know, if he pleases; for it depends not upon the arbitrary will of any judge, but is permanent, fixed, and unchangeable, unless by authority of parliament. I shall however just mention a few *negative* statutes, whereby abuses, perversions, or delays of justice, especially by the prerogative, are restrained. It is ordained by *magna carta*,[e] that no freeman shall be outlawed, that is, put out of the protection and benefit of the laws, but according to the law of the land. By 2 Edw. III. c. 8, and 11 Ric. II. c. 10, it is enacted, that no commands or letters shall be sent under the great seal, or the little seal, the signet, or privy seal, in disturbance of the law; or to disturb or delay common right: and, though such commandments should come, the judges shall not cease to do right; which is also made a part of their oath by statute 18 Edw. III. st. 4. And by 1 W. & M. st. 2, c. 2, it is declared, that the pretended power of suspending, or dispensing with laws, or the execution of laws, by regal authority, without consent of parliament, is illegal.

The substance of the law cannot be altered but by parliament,

Not only the substantial part, or judicial decisions, of the law, but also the formal part, or method of proceeding, cannot be altered but by parliament: for, if once those outworks were demolished, there would be an inlet to all manner of innovation in the body of the law itself. The king, it is true, may erect new courts of justice; but then they must proceed according to the old established forms of the common law. For which reason it is declared in the statute 16 Car. I. c. 10, upon the dissolution of the court of star-chamber, that neither his majesty, nor his privy council, have any jurisdiction, power, or authority by English bill, petition, articles, libel, (which were the course of proceeding in the star-chamber, borrowed from the civil law) or by any other arbitrary way whatsoever, to examine, or draw into question, determine, or dispose of the lands or goods of any subjects of this kingdom; but that the same ought to be tried and determined in the ordinary courts of justice, and by *course of law*.

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[e] c. 29.

[143] 4. If there should happen any uncommon injury, or infringement of the rights before-mentioned, which the ordinary course of law is too defective to reach, there still remains a fourth subordinate right, appertaining to every individual, namely, the right of petitioning the king, or either house of parliament, for the redress of grievances. In Russia we are told[f] that the czar Peter established a law, that no subject might petition the throne, till he had first petitioned two different ministers of state. In case he obtained justice from neither, he might then present a third petition to the prince; but upon pain of death, if found to be in the wrong. The consequence of which was, that no one dared to offer such third petition; and grievances seldom falling under the notice of the sovereign, he had little opportunity to redress them. The restrictions, for some there are, which are laid upon petitioning in England, are of a nature extremely different; and while they promote the spirit of peace, they are no check upon that of liberty. Care only must be taken, lest, under the pretence of petitioning, the subject be guilty of any riot or tumult; as happened in the opening of the memorable parliament in 1640: and, to prevent this, indeed it is provided by the statute 13 Car. II. st. 1, c. 5, that no petition to the king, or either house of parliament, for alteration of matters established by law in church or state, shall be signed by above twenty persons, unless the matter thereof be approved by three justices of the peace, or the major part of the grand jury, at assizes or quarter sessions in the country; and in London by the lord mayor, aldermen, and common council: nor shall any petition be presented by more than ten persons at a time. But, under these regulations, it is declared by the Bill of Rights, 1 W. & M. st. 2, c. 2, that the subject hath a right to petition; and that all commitments and prosecutions for such petitioning are illegal. The judges have held, although not without opinions[g] to the contrary, that the statute of Charles II. was not in any degree affected by the Bill of Rights.[h] The former has, however, to a great extent

4. The right of petitioning the king and parliament.

State of the law as to petitioners.

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[f] Montesq. Sp. L. xii. 26.

[g] Mr. Dunning expressed an opinion to the contrary. See *Ann. Reg.* (1781) and *Sedgwick on Blackstone*, 107.

[h] Doug. 591.

become obsolete, and would at any rate be construed strictly, as meetings are constantly held and petitions prepared and presented in parliament, relating to alterations in church and state which are not in conformity with this statute. But meetings for the purpose of petitioning, of more than fifty persons, in any open place in Westminster or Middlesex, within one mile of Westminster Hall are illegal.[i]

5. The havingarms for defence.

5. The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence, suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same [144] statute 1 W. & M. st. 2, c. 2, and it is indeed a public allowance under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.

In these articles consist the liberties of Englishmen.

In these several articles consist the rights, or, as they are frequently termed, the liberties of Englishmen: liberties, more generally talked of, than thoroughly understood; and yet highly necessary to be perfectly known and considered by every man of rank or property, lest his ignorance of the points whereon they are founded should hurry him into faction and licentiousness on the one hand, or a pusillanimous indifference and criminal submission on the other. And we have seen that these rights consist, primarily, in the free enjoyment of personal security, of personal liberty, and of private property. So long as these remain inviolate, the subject is perfectly free; for every species of compulsive tyranny and oppression must act in opposition to one or other of these rights, having no other object upon which it can possibly be employed. To preserve these from violation, it is necessary that the constitution of parliament be supported in it's full vigour; and limits, certainly known, be set to the royal prerogative. And, lastly, to vindicate these rights, when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts of law; next, to the right of petitioning the king and parliament for redress of grievances; and, lastly, to the right of having and using arms for self-preservation and defence. And all these rights and liberties it is our birthright to enjoy entire; unless where the laws of our country have laid them under necessary restraints. Restraints in themselves so gentle and moderate, as will appear upon farther inquiry, that no man of sense or probity would wish to see them slackened. For all of us have it in our choice to do every thing that a good man would desire to do; and are restained from nothing, but what would be pernicious either to ourselves or our [145] fellow-citizens. So that this review of our situation may fully justify the observation of a learned French author, who indeed generally both thought and wrote in the spirit of genuine freedom[1]; and who hath not scrupled to profess, even in the very bosom of his native country, that the English is the only nation in the world, where political or civil liberty is the direct end of it's constitution. Recommending therefore to the student in our laws a farther and more accurate search into this extensive and important title, I shall close my remarks upon it with the expiring wish of the famous father Paul to his country, "ESTO PERPETUA!"

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[i] 57 Geo. III. c. 19. s. 23.

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[1] Montesq. Sp. L. xi. 5.

CHAPTER THE SECOND.

OF THE PARLIAMENT.

We are next to treat of the rights and duties of persons, as they are members of society, and stand in various relations to each other. These relations are either public or private: and we will first consider those that are public. [146]

The relations of members of society are either public or private.

The most universal public relation, by which men are connected together, is that of government; namely, as governors and governed, or, in other words, as magistrates and people. Of magistrates some also are *supreme,* in whom the sovereign power of the state resides; others are *subordinate,* deriving all their authority from the supreme magistrate, accountable to him for their conduct, and acting in an inferior secondary sphere.

The relation of government.

In all tyrannical governments the supreme magistracy, or the right of both *making* and of *enforcing* the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty. The magistrate may enact tyrannical laws, and execute them in a tyrannical manner, since he is possessed, in quality of dispenser of justice, with all the power which he as legislator thinks proper to give himself. But, where the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power, as may tend to the subversion of its own independence, and therewith of the liberty of the subject. With us therefore in England this supreme power is divided into two branches; the one [147] legislative, to wit, the parliament, consisting of king, lords, and commons; the other executive, consisting of the king

In tyrannical governments the right of making and enforcing the laws is in the same person or body.

but in England they are distinct branches.

alone. It will be the business of this chapter to consider the British parliament; in which the legislative power, and (of course) the supreme and absolute authority of the state, is vested by our constitution.

The origin of parliaments.

The original or first institution of parliaments is one of those matters which lie so far hidden in the dark ages of antiquity, that the tracing of it out is a thing equally difficult and uncertain. The word, *parliament,* itself (*parlement* or *colloquium,* as some of our historians translate it) is comparatively of modern date; derived from the French, and signifying an assembly that met and conferred together. It was first applied to general assemblies of the states under Louis VII. in France, about the middle of the twelfth century.[a] But it is certain that, long before the introduction of the Norman language into England, all matters of importance were debated and settled in the great councils of the realm. A practice which seems to have been universal among the northern nations, particularly the Germans;[b] and carried by them into all the countries of Europe, which they overran at the dissolution of the Roman empire. Relics of which constitution, under various modifications and changes, are still to be met with in the diets of Poland, Germany, and Sweden, and the former assembly of the estates in France:[c] for what is there now called the parliament is only the supreme court of justice, consisting of the peers, certain dignified ecclesiastics and judges; which neither is in practice, nor is supposed to be in theory, a general council of the realm.

They have been held in England immemorially,

With us in England this general council hath been held immemorially, under the several names of *michel-synoth* or great council, *michel-gemote* or great meeting, and more [148] frequently *wittena-gemote* or the meeting of wise men. It was also styled in Latin, *commune concilium regni, magnum concilium regis, curia magna, conventus magnatum vel pro-*

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[a] Mod. Un. Hist. xxiii. 307. The first mention of it in our statute law is in the preamble to the statute of Westm. 1. 3 Edw. I. *A. D.* 1272.

[b] *De minoribus rebus principes consultant, de majoribus omnes.* Tac. *de mor. Germ. c.* 11.

[c] These were assembled for the last time, after an interval of nearly two hundred years, on the 5th of May 1789, immediately preceding the first French Revolution, and soon afterwards took the name of the National Assembly.

cerum, assisa generalis, and sometimes *communitas regni Angliæ.*[d] We have instances of its meeting to order the affairs of the kingdom, to make new laws, and to mend the old, or, as Fleta[e] expresses it, "*novis injuriis emersis nova* "*constituere remedia*," so early as the reign of Ina king of the West Saxons, Offa king of the Mercians, and Ethelbert king of Kent, in the several realms of the Heptarchy. And, after their union, the mirror[f] informs us, that king Alfred ordained for a perpetual usage, that these councils should meet twice in the year, or oftener, if need be, to treat of the government of God's people; how they should keep themselves from sin, should live in quiet, and should receive right. Our succeeding Saxon and Danish monarchs held frequent councils of this sort, as appears from their respective codes of laws; the titles whereof usually speak them to be enacted, either by the king with the advice of his wittena-gemote, or wise men, as "*haec sunt instituta, quæ* "*Edgarus rex consilio sapientum suorum instituit*;" or to be enacted by those sages with the advice of the king, as, "*haec sunt judicia, quæ sapientes consilio regis Ethelstani* "*instituerunt*;" or lastly, to be enacted by them both together, as "*haec sunt institutiones, quas rex Edmundus* "*et episcopi sui cum sapientibus suis instituerunt.*"

And occasionally held under the first princes of the Norman line.

There is also no doubt but these great councils were occasionally held under the first princes of the Norman line. Glanvil, who wrote in the reign of Henry the second, speaking of the particular amount of an amercement in the sheriff's court, says, it had never yet been ascertained by the general assize, or assembly, but was left to the custom of particular counties.[g] Here the general assize is spoken of as a meeting well known, and its statutes or decisions are put in a manifest contradistinction to custom, or the common [149] law. And in Edward the third's time an act of parliament, made in the reign of William the Conqueror, was pleaded in the case of the abbey of St. Edmund's-bury, and judicially allowed by the court.[h]

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[d] Glanvil. *l.* 13. *c.* 32. *l.* 9. *c.* 10.—Pref. 9 Rep.—2 Inst. 526.

[e] *l.* 2. *c.* 2.

[f] c. 1. §. 3.

[g] *Quanta esse debeat per nullam assisam generalem determinatum est, sed pro consuetudine singulorum comitatuum debetur. l.* 9. *c.* 10.

[h] Year book, 21 Edw. III. 60.

And are thus coeval with the kingdom.

The present constitution of parliament was marked out in 1215, in the reign of John.

Division of this chapter.

Hence it indisputably appears, that parliaments, or general councils, are coeval with the kingdom itself. How those parliaments were constituted and composed, is another question, which has been matter of great dispute among our learned antiquaries; and, particularly, whether the commons were summoned at all; or, if summoned, at what period they began to form a distinct assembly. But it is not my intention here to enter into controversies of this sort. I hold it sufficient that it is generally agreed, that in the main the constitution of parliament, as it now stands, was marked out so long ago as the seventeenth year of king John, *A. D.* 1215, in the great charter granted by that prince; wherein he promises to summon all archbishops, bishops, abbots, earls, and greater barons, personally; and all other tenants in chief under the crown, by the sheriff and bailiffs; to meet at a certain place, with forty days' notice, to assess aids and scutages when necessary. And this constitution has subsisted in fact at least from the year 1266, 49 Hen. III.; there being still extant writs of that date, to summon knights, citizens, and burgesses to parliament. I proceed therefore to inquire wherein consists this constitution of parliament, as it now stands, and has stood for the space of nearly six hundred years. And in the prosecution of this inquiry, I shall consider, first, the manner and time of its assembling: secondly, its constituent parts: thirdly, the laws and customs relating to parliament, considered as one aggregate body: fourthly and fifthly, the laws and customs relating to each house, separately and distinctively taken: sixthly, the methods of proceeding, and of making statutes, in both houses: and lastly, the manner of the parliament's adjournment, prorogation and dissolution.

I. As to the manner and time of the assembling of parliament; it is convened by the king.

[150] I. As to the manner and time of assembling. The parliament is regularly to be summoned by the king's writ or letter, issued out of chancery by advice of the privy council, at least fourteen days before it begins to sit.[1] It is a branch

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[1] Forty days' previous notice was formerly necessary by the 7 & 8 Wm. III. c. 25, but by the 37 Geo. III. c. 127, the above number of days was substituted; and by the 39 & 40 Geo. III. c. 14, the king is empowered, in cases where parliament has been adjourned, to cause it to re-assemble within fourteen days after a proclamation to that effect, notwithstanding the adjournment may have been made to a longer day.

of the royal prerogative, that no parliament can be convened by its own authority, or by the authority of any, except the king alone. And this prerogative is founded upon very good reason. For, supposing it had a right to meet spontaneously, without being called together, it is impossible to conceive that all the members, and each of the houses, would agree unanimously upon the proper time and place of meeting; and if half of the members met, and half absented themselves, who shall determine which is really the legislative body, the part assembled, or that which stays away? It is therefore necessary that the parliament should be called together at a determinate time and place: and highly becoming its dignity and independence, that it should be called together by none but one of its own constituent parts: and, of the three constituent parts, this office can only appertain to the king; as he is a single person, whose will may be uniform and steady; the first person in the nation, being superior to both houses in dignity; and the only branch of the legislature that has a separate existence, and is capable of performing any act at a time when no parliament is in being.[j] Nor is it an exception to this rule that, by some modern statutes, on the demise of a king or queen, if there be then no parliament in being, the last parliament revives, and is to sit again for six months, unless dissolved by the successor: for this revived parliament must have been originally summoned by the crown.

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Stat. 16. Car. I. c. 1, repealed by the

It is true, that by a statute, 16 Car. I. c. 1, it was enacted, that, if the king neglected to call a parliament for three years, the peers might assemble and issue out writs for choosing one; and, in case of neglect of the peers, the constituents might meet and elect one themselves. But this, if ever put in practice, would have been liable to all the inconveniences I have just now stated: and the act itself was esteemed so highly detrimental and injurious to the royal prerogative, that it was repealed by statute 16 Car. II. c. 1. From thence therefore no precedent can be drawn.

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[j] By motives somewhat similar to these the republic of Venice was actuated, when towards the end of the seventh century it abolished the tribunes of the people, who were annually chosen by the several districts of the Venetian territory, and constituted a doge in their stead; in whom the executive power of the state at present resides. For which their historians have assigned these, as the principal reasons. 1. The propriety of having the executive power a part of the legislative, or senate; to which the former annual magistrates were not admitted. 2. The necessity of having a single person to convoke the great council when separated. (*Mod. Un. Hist.* xxvii. 15.)

16 Car. II. c. 1.

The convention-parliament 1660.

It is also true, that the convention-parliament, which restored king Charles the second, met above a month before his return; the lords by their own authority, and the commons in pursuance of writs issued in the name of the keepers of the liberty of England by authority of parliament: and that the said parliament sat till the twenty-ninth of December, full seven months after the restoration; and enacted many laws, several of which are still in force. But this was for the necessity of the thing, which supersedes all law; for if they had not so met, it was morally impossible that the kingdom should have been settled in peace. And the first thing done after the king's return was to pass an act declaring this to be a good parliament, notwithstanding the defect of the king's writs.[k] So that, as the royal prerogative was chiefly wounded by their so meeting, and as the king himself, who alone had a right to object, consented to waive the objection, this cannot be drawn into an example in prejudice of the rights of the crown. Besides we should also remember, that it was at that time a great doubt among the lawyers,[l] whether even this healing act made it a good parliament; and held by very many in the negative: though it seems to have been too nice a scruple. And yet, out of abundant caution, it was thought necessary to confirm its acts in the next parliament, by statute 13 Car. II. c. 7, and c. 14.

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The convention-parliament, 1688.

It is likewise true, that at the time of the Revolution, *A. D.* 1688, the lords and commons by their own authority, and upon the summons of the prince of Orange, (afterwards king William) met in a convention, and therein disposed of the crown and kingdom. But it must be remembered, that this assembling was upon a like principle of necessity as at the restoration; that is, upon a full conviction that king James the second had abdicated the government, and that the throne was thereby vacant: which supposition of the individual members was confirmed by their concurrent resolution, when they actually came together. And, in such a case as the palpable vacancy of a throne, it follows *ex necessitate rei*, that the form of the royal writs must be laid aside, otherwise no parliament can ever meet again. For, let us put another possible case, and suppose, for the sake of argument, that the whole royal line should at any time fail and become extinct, which would indisputably vacate the throne: in this situation it seems reasonable to presume, that the body of the nation, consisting of lords and commons, would have a right to meet and settle the government; otherwise there must be no government at all. And upon this and no other principle did the convention in 1688 assemble. The vacancy of the throne was precedent to their meeting without any royal summons, not a consequence of it. They did not assemble without writ, and then make the throne vacant; but, the throne being previously vacant by the king's abdication, they assembled without writ, as they must do if they assembled at all. Had the throne been full, their meeting would not have been regular; but, as it was really empty, such meeting became absolutely necessary. And accordingly it is declared by statute 1 W. & M. st. 1, c. 1, that this convention was really the two houses of parliament, notwithstanding the want of writs or other defects of form. So that, notwithstanding these two capital exceptions, which were justifiable only on a principle of necessity, (and each of which, by the way, induced a revolution in the government) the rule laid down is in general certain, that the king, only, can convoke a parliament.

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[k] Stat. 12. Car. II. c. 1.

[l] 1 Sid. 1.

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Statutes relating to the convocation of parliament.

And this by the ancient statutes of the realm,[m] he is bound to do every year, or oftener, if need be. Not that he is, or ever was, obliged by these statutes to call a *new* parliament every year; but only to permit a parliament to sit annually for the redress of grievances, and dispatch of business, *if need be*. These last words are so loose and vague, that such of our monarchs as were inclined to govern without parliaments, neglected the convoking them, sometimes for a very considerable period, under pretence that there was no need of them. But, to remedy this, by the statute 16 Car. II. c. 1, it is enacted, that the sitting and holding of parliaments shall not be intermitted above three years at the most. And by the statute 1 W. & M. st. 2, c. 2, it is declared to be one of the rights of the people, that for redress of all grievances, and for the amending, strengthening, and preserving the laws, parliaments ought to be held *frequently*. And this indefinite *frequency* is again reduced to a certainty by statute 6 W. & M. c. 2, which enacts, as the statute of Charles the second had done before, that a new parliament shall be called within three years[1] after the determination of the former. And at the present time as the mutiny act, the marine forces act and other acts are passed for one year only, parliament must necessarily be summoned for the dispatch of business once every year, and such has been the practice of the constitution since the Revolution in 1688.

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[m] 4 Edw. III. c. 14. 36 Edw. III. c. 10.

II. The constituent parts of parliament, king, lords and commons.

II. The constituent parts of a parliament are the next objects of our inquiry. And these are, the king's majesty, sitting there in his royal political capacity, and the three estates of the realm; the lords spiritual, the lords temporal, (who sit, together with the king, in one house) and the commons, who sit by themselves in another. And the king and these three estates, together, form the great corporation or body politic of the kingdom,[m] of which the king is said to be *caput, principium, et finis*. For upon their coming together the king meets them, either in person or by representation; without which there can be no beginning of a parliament:[n] and he also has alone the power of dissolving them.

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What each branch may do.

It is highly necessary for preserving the balance of the constitution, that the executive power should be a branch, though not the whole, of the legislative. The total union of them, we have seen, would be productive of tyranny; the total disjunction of them, for the present, would in the end produce the same effects, by causing that union against

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[1] This is the same period that is allowed in Sweden for intermitting their general diets, or parliamentary assemblies. *Mod. Un. Hist.* xxxiii. 15.

[m] 4 Inst. 1, 2. Stat. 1 Eliz. c. 3. Hale of Parl. 1.

[n] 4 Inst. 6.

which it seems to provide. The legislature would soon become tyrannical, by making continual encroachments, and gradually assuming to itself the rights of the executive power. Thus the long parliament of Charles the first, while it acted in a constitutional manner, with the royal concurrence, redressed many heavy grievances and established many salutary laws. But when the two houses assumed the power of legislation, in exclusion of the royal authority, they soon after assumed likewise the reins of administration; and, in consequence of these united powers, overturned both church and state, and established a worse oppression than any they pretended to remedy. To hinder therefore any such encroachments, the king is himself a part of the parliament: and, as this is the reason of his being so, very properly therefore the share of legislation, which the constitution has placed in the crown, consists in the power of *rejecting* rather than *resolving;* this being sufficient to answer the end proposed. For we may apply to the royal negative, in this instance, what Cicero observes of the negative of the Roman tribunes, that the crown has not any power of *doing* wrong, but merely of *preventing* wrong from being done.[o] The crown cannot begin of itself any alterations in the present established law; but it may approve or disapprove of the alterations suggested and consented to by the two houses. The legislative therefore cannot abridge the executive power of any rights which it now has by law, without its own consent; since the law must perpetually stand as it now does, unless all the powers will agree to alter it. And herein indeed consists the true excellence of the English government, that all the parts of it form a mutual check upon each other. In the legislature, [155]
the people are a check upon the nobility, and the nobility a check upon the people; by the mutual privilege of rejecting what the other has resolved: while the king is a check upon both, which preserves the executive power from encroachments. And this very executive power is again checked and kept within due bounds by the two houses, through the privilege they have of inquiring into, impeach-

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[o] *Sulla—tribunis plebis sua lege injuriæ faciendæ potestatem ademit, auxilii ferendi reliquit. De LL.* 3. 9.

ing, and punishing the conduct (not indeed of the king,[p] which would destroy his constitutional independence; but, which is more beneficial to the public) of his evil and pernicious counsellors. Thus every branch of our civil polity supports and is supported, regulates and is regulated, by the rest: for the two houses naturally drawing in two directions of opposite interest, and the prerogative in another still different from them both, they mutually keep each other from exceeding their proper limits; while the whole is prevented from separation, and artificially connected together by the mixed nature of the crown, which is a part of the legislative, and the sole executive magistrate. Like three distinct powers in mechanics, they jointly impel the machine of government in a direction different from what either, acting by itself, would have done; but at the same time in a direction partaking of each, and formed out of all; a direction which constitutes the true line of the liberty and happiness of the community.[q]

The king. Let us now consider these constituent parts of the sovereign power, or parliament, each in a separate view. The king's majesty will be the subject of the next, and many subsequent chapters, to which we must at present refer.

The lords spiritual. The next in order are the spiritual lords. These consist of two archbishops, and twenty-four bishops: and at the dissolution of monasteries by Henry VIII., consisted likewise of twenty-seven mitred abbots, and two priors;[r] a very considerable body, and in those times equal in number, according to Blackstone, to the temporal nobility.[s] All [156] these hold, or are supposed to hold, certain ancient baronies under the king; for William the conqueror thought proper to change the spiritual tenure of frankalmoign or free alms, under which the bishops held their lands during the Saxon government, into the feodal or Norman tenure by barony; which subjected their estates to all civil charges and assessments, from which they were before exempt:[t] and, in right of succession to those baronies, which were unalienable from their respective dignities, the bishops and abbots were allowed their seats in the house of lords.[u] But though these lords spiritual are in the eye of the law a distinct estate from the lords temporal, and are so distinguished in most of our acts of parliament, yet in practice they are usually blended together under the one name of *the lords;* they intermix in their votes; and the majority of such intermixture joins both estates. And from this want of a separate assembly and separate negative of the prelates, some writers have argued[v] very cogently, that the lords spiritual and temporal are now in reality only one estate:[w] which is unquestionably true in every effectual sense, though the ancient distinction between them still nominally continues. For if a bill should pass their house, there is no doubt of its validity, though every lord spiritual should vote against it; of which Selden,[x] and sir Edward Coke,[y] give many instances: as, on the other hand, I presume it would be equally good, if the lords temporal present were inferior to the bishops in number, and every one of those temporal lords gave his vote to reject the bill; though sir Edward Coke seems to doubt[z] whether this would not be an *ordinance,* rather than an *act* of parliament. Since the union with Ireland, as we have already seen,[a] four lords spiritual of that country by rotation of sessions are added to the lords spiritual of England, and sit and vote in the house of lords.

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[p] Stat. 12 Car. II. c. 30.

[q] As to the theory of an exact balance of power being preserved in the three branches of the constitution, see *ante*, p. 43.

[r] Seld. tit. Hon. 2. 5. 27. Co. Litt. 27 a.

[s] Co. Litt. 97 a. 4 Inst. 1.

[t] Gilb. Hist. Exch. 55. Spelm. W. 1. 291.

[157] **The lords temporal.**

The lords temporal consist of all the peers of the realm (the bishops not being in strictness held to be such, but merely lords of parliament)[b] by whatever title of nobility distinguished; dukes, marquisses, earls, viscounts, or barons; of which dignities we shall speak more hereafter. Some of these sit by descent, as do all ancient peers; some by creation, as do all new-made ones; others, since the union with Scotland and Ireland, by election, which is the case of the sixteen peers, who represent the body of the Scots nobility, and the twenty-eight peers who represent the body of the Irish nobility.[c] Their number is indefinite, and may be increased at will by the power of the crown: and once, in the reign of queen Anne, there was an instance of creating no less than twelve together; in contemplation of which in the reign of king George the first, a bill passed the house of lords, and was countenanced by the then ministry, for limiting the number of the peerage. This was thought by some to promise a great acquisition to the constitution, by restraining the prerogative from gaining the ascendant in that august assembly, by pouring in at pleasure an unlimited number of new created lords. But the bill was ill-relished and miscarried in the house of commons, whose leading members were then desirous to keep the avenues to the other house as open and easy as possible, and at subsequent periods there have been large simultaneous creations.

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[u] Glanv. 7. 1. Co. Litt. 97. Seld. tit. Hon. 2. 5. 19. See also Harg. note. 1 Co. Litt. 134 b; and Hallam *Mid. Ag.* ch. 8.

[v] Whitelocke on Parliam. c. 72. Warburt. Alliance. b. 2. c. 3.

[w] Dyer, 60.

[x] Baronage, p. 1. c. 6. The Act of Uniformity, 1 Eliz. c. 2. was passed with the dissent of all the bishops; (Gibs. Codex, 286.) and therefore the style of *lords spiritual* is omitted throughout the whole.

[y] 2 Inst. 585, 6, 7. See Keilw. 184; where it is holden by the judges, 7 Hen. VIII. that the king may hold a parliament without any spiritual lords. This was also exemplified in fact in the two first parliaments of Charles II.; wherein no bishops were summoned, till after the repeal of the statute 16 Car. I. c. 27, by statute 13 Car. II. st. 1, c. 2.

[z] 4 Inst. 25.

[a] See *ante*, p. 97.

[b] Staunford. P. C. 153.

The advantages of distinction of rank.

The distinction of rank and honours is necessary in every well-governed state: in order to reward such as are eminent for their services to the public, in a manner the most desirable to individuals, and yet without burden to the community; exciting thereby an ambitious yet laudable ardour, and generous emulation, in others. And emulation, or virtuous ambition, is a spring of action which, however dangerous or invidous in a mere republic or under a despotic sway, will certainly be attended with good effects under a free monarchy: where, without destroying its existence, its excesses may be continually restrained by that superior power, from which all honour is derived. Such a spirit, when nationally diffused, gives life and vigour to the community; it sets all the wheels of government in motion, [158] which, under a wise regulator, may be directed to any beneficial purpose; and thereby every individual may be made subservient to the public good, while he principally means to promote his own particular views. A body of nobility is also more peculiarly necessary in our mixed and compounded constitution, in order to support the rights of both the crown and the people, by forming a barrier to withstand the encroachments of both. It creates and preserves that gradual scale of dignity, which proceeds from the peasant to the prince; rising like a pyramid from a broad foundation, and diminishing to a point as it rises. It is this ascending and contracting proportion that adds stability to any government; for when the departure is sudden from one extreme to another, we may pronounce that state to be precarious. The nobility therefore are the pillars, which are reared from among the people, more immediately to support the throne; and if that falls, they must also be buried under its ruins. Accordingly, when in the seventeenth century the commons had determined to extirpate monarchy, they also voted the house of lords to be useless and dangerous. And since titles of nobility are thus expedient in the state, it is also expedient that their owners should form an independent and separate branch of the legislature. If they were confounded with the mass of the people, and like them had only a vote in electing representatives, their privileges would soon be borne down and overwhelmed by the popular torrent, which would effectually level all distinctions. It is therefore highly necessary that the body of nobles should have a distinct assembly, distinct deliberations, and distinct powers from the commons.

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[c] See *ante*, pp. 89 and 97.

The commons.

The commons consist of all such men of property in the kingdom, as have not seats in the house of lords; every one of which has a voice in parliament, either personally, or by his representatives. In a free state every man, who is supposed a free agent, ought to be in some measure his own governor: and therefore a branch at least of the legislative power should reside in the whole body of the people. And this power, when the territories of the state are small and its citizens easily known, should be exercised by the people in their aggregate or collective capacity, as was wisely ordained in the petty republics of Greece, and the first rudiments of the Roman state. [159] But this will be highly inconvenient, when the public territory is extended to any considerable degree, and the number of citizens is increased. Thus when, after the social war, all the burghers of Italy were admitted free citizens of Rome, and each had a vote in the public assemblies, it became impossible to distinguish the spurious from the real voter, and from that time all elections and popular deliberations grew tumultuous and disorderly; which paved the way for Marius and Sylla, Pompey and Cæsar, to trample on the liberties of their country, and at last to dissolve the commonwealth. In so large a state as ours it is therefore very wisely contrived, that the people should do that by their representatives, which it is impracticable to perform in person; representatives, chosen by a number of minute and separate districts, wherein all the voters are, or easily may be, distinguished. The counties are therefore represented by knights, elected by the proprietors of lands: the cities and boroughs are represented by citizens and burgesses, chosen by the mercantile part or supposed trading interest of the nation; much in the same manner as the burghers in the diet of Sweden are chosen by the corporate towns, Stockholm sending four, as the city of London does with us, other cities two, and some only one.[d] The number of English representatives, before the passing of the Reform Act,[e] was 513, and of Scots 45; and of Irish 100, in all 658; but by that act the number of representatives for England is reduced to 500, and by the corresponding act for Scotland, the number of representatives for that country is increased from 45 to 53;[f] and by that for Ireland the number of representatives for that country increased from 100 to 105.[g] And every member, though chosen by one particular district, when elected and returned serves for the whole realm. For the end of his coming thither is not particular, but general: not barely to advantage his constituents, but the *common* wealth; to advise his majesty (as appears from the writ of summons)[h] "*de communi consilio super* "*negotiis quibusdam arduis et urgentibus, regem, statum, et* "*defensionem regni Angliæ et ecclesiæ Anglicanæ concernen-* "*tibus,*" And therefore he is not bound, like a deputy in the united provinces, to consult with, or take the advice, of his constituents upon any particular point, unless he himself thinks it proper or prudent so to do.

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[d] Mod. Un. Hist. xxxiii. 18.

[e] 2 & 3 W. IV. c 45.

[f] 2 & 3 W. IV. c. 65.

[g] 2 & 3 W. IV. c. 88.

[h] 4 Inst. 14.

[160] These are the constituent parts of a parliament; the king, the lords spiritual and temporal, and the commons. Parts of which each is so necessary, that the consent of all three is required to make any new law that shall bind the subject. Whatever is enacted for law by one, or by two only, of the three is no statute; and to it no regard is due, unless in matters relating to their own privileges. For though, in the times of madness and anarchy, the commons once passed a vote,[i] "that whatever is enacted or declared for law by the "commons in parliament assembled hath the force of law; "and all the people of this nation are concluded thereby, "although the consent and concurrence of the king or house "of peers be not had thereto;" yet, when the constitution was restored in all its forms, it was particulurly enacted by statute 13 Car. II. c. 1, that if any person shall maliciously or advisedly affirm, that both or either of the houses of parliament have any legislative authority without the king, such person shall incur all the penalties of a *præmunire*.

The consent of the three branches is required to make a new law.

III. The laws and customs relating to parliament.

III. We are next to examine the laws and customs relating to parliament, thus united together and considered as one aggregate body.

The power and jurisdiction of parliament, says Sir Edward Coke,[j] is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. And of this high court, he adds, it may be truly said, "*si* "*antiquitatem spectes, est vetustissima; si dignitatem, est* "*honoratissima; si jurisdictionem, est capacissima.*" It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical, or temporal, civil, military, maritime, or criminal: this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms. [161] All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are

The transcendent power of parliament.

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[i] 4 Jan. 1648.

[j] 4 Inst. 36.

within the reach of this extraordinary tribunal. It can regulate or new model the succession to the crown; as was done in the reign of Henry VIII. and William III. It can alter the established religion of the land; as was done in a variety of instances, in the reigns of king Henry VIII. and his three children. It can change and create afresh even the constitution of the kingdom and of parliaments themselves; as was done by the acts of union, and the several statutes for triennial and septennial elections. It can, in short, do every thing that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of parliament. True it is, that what the parliament doth, no authority upon earth can undo. So that it is a matter most essential to the liberties of this kingdom, that such members be delegated to this important trust, as are most eminent for their probity, their fortitude, and their knowledge; for it was a known apothegm of the great lord treasurer Burleigh, "that "England could never be ruined but by a parliament:" and, as Sir Matthew Hale observes,[k] this being the highest and greatest court, over which none other can have jurisdiction in the kingdom, if by any means a misgovernment should any way fall upon it, the subjects of this kingdom are left without all manner of remedy. To the same purpose the president Montesquieu, though I trust too hastily, presages;[l] that as Rome, Sparta, and Carthage have lost their liberty and perished, so the constitution of England will in time lose its liberty, will perish: it will perish, whenever the legislative power shall become more corrupt than the executive.

Whether there be a supreme power to alter the legislative.

It must be owned that Mr. Locke,[m] and other theoretical writers, have held, that "there remains still inherent in the "people a supreme power to remove or alter the legislative, "when they find the legislative act contrary to the trust re-"posed in them: for, when such trust is abused, it is "thereby forfeited, and devolves to those who gave it." But however just this conclusion may be in theory, we can-[162] not practically adopt it, nor take any *legal* steps for carrying it into execution, under any dispensation of government at present actually existing. For this devolution of power, to the people at large, includes in it a dissolution of the whole form of government established by that people; reduces all the members to their original state of equality; and, by annihilating the sovereign power, repeals all positive laws whatsoever before enacted. No human laws will therefore suppose a case, which at once must destroy all law, and compel men to build afresh upon a new foundation; nor will they make provision for so desperate an event, as must render all legal provisions ineffectual.[n] So long therefore as the English constitution lasts, we may venture to affirm, that the power of parliament is absolute and without control.

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[k] of Parliaments, 49. [l] Sp. L. 11. 6. [m] on Gov. p. 2. §. 149. 227.

No one shall sit or vote in either house of parliament unless he be 21, or unless he take certain oaths.

In order to prevent the mischiefs that might arise, by placing this extensive authority in hands that are either incapable, or else improper, to manage it, it is provided by the custom and law of parliament,[o] that no one shall sit or vote in either house, unless he be twenty-one years of age. This is also expressly declared by statute 7 & 8 W. III. c. 25, with regard to the house of commons; doubts having arisen, from some contradictory adjudications, whether or no a minor was incapacitated from sitting in that house.[p] It is also enacted by statute 30 Car. II. st. 2, c. 1, and 1 & 2 W. IV. c. 9,[q] that no member be permitted to sit or vote in the house of commons (except for the choosing a speaker), till he hath taken the oath of allegiance at the table in that house: and by 30 Car. II. st. 2, 1 Geo. I. c. 13, and 6 Geo. III. c. 53, it was enacted, that no member should vote or sit in either house, till he had in the presence of the house taken the oath of allegiance, supremacy, and abjuration, and subscribed and repeated the declaration against transubstantiation, and invocation of saints, and the sacrifice of the mass. But by the act for granting Catholic emancipation[r] the declaration against transubstantiation, and invocation of saints, and the sacrifice of the mass, need not be taken by Roman Catholics, and for them a new form of oath is substituted, not offensive to their religious belief. Aliens, unless naturalized, were likewise by the law of parliament incapable to serve therein:[s] and now it is enacted, by statute 12 & 13 W. III. c. 2, that no alien, even though he be naturalized, shall be capable of being a member of either [163] house of parliament. And there are not only these standing incapacities; but if any person is made a peer by the king, or elected to serve in the house of commons by the people, yet may the respective houses upon complaint of any crime in such person, and proof thereof, adjudge him disabled and incapable to sit as a member:[t] and this by the law and custom of parliament.

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[n] See *post*, chap. VII.

[o] Whitelocke, c. 50. 4 Inst. 47.

[p] Com. Journ. 16 Dec. 1690.

[q] Before this statute the oath of allegiance had to be taken before the Lord Steward, or his deputy, 7 Jac. I. c. 6, which was repealed by the 1 & 2 W. IV. c. 9.

[r] 10 Geo. IV. c. 7.

Lex et consuetudo parliamenti.

For, as every court of justice hath laws and customs for its direction, some the civil and canon, some the common law, others their own peculiar laws and customs, so the high court of parliament hath also its own peculiar law, called the *lex et consuetudo parliamenti;* a law which Sir Edward Coke[u] observes is "*ab omnibus quaerenda, a multis ignorata* "*a paucis cognita.*" It will not therefore be expected that we should enter into the examination of this law, with any degree of minuteness: since, as the same learned author assures us,[v] it is much better to be learned out of the rolls of parliament, and other records, and by precedents, and continual experience, than can be expressed by any one man. It will be sufficient to observe, that the whole of the law and custom of parliament has its original from this one maxim, "that whatever matter arises concerning either house of par- "liament, ought to be examined, discussed, and adjudged "in that house to which it relates, and not elsewhere."[w] Hence, for instance, the lords will not suffer the commons to interfere in settling the election of a peer of Scotland:

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[s] Com. Journ. 10 Mar. 1623. 18 Feb. 1625.

[t] Whitelocke of parl. c. 102. See Lord's Journ. 3 May 1620. 13 May 1624. 26 May 1725. Com. Journ. 14 Feb. 1580. 21 Jun. 1628. 9 Nov. 21 Jan. 1640. 6 Mar. 1676. 6 Mar. 1711. The resolution of the 17th of Feb. 1769, expelling Mr. Wilkes from the House of Commons, and cited by Blackstone as authority for the above proposition, was ordered to be expunged from the journals on the 3rd of May 1783. Sufficient authority, however, remains.

[u] 1 Inst. 11. See what Lord Holt says on this, 2 Ld. Raym. 1114.

[v] 4 Inst. 50.

[w] 4 Inst. 15.

the commons will not allow the lords to judge of the election of a burgess; nor will either house permit the subordinate courts of law to examine the merits of either case. But the maxims upon which they proceed, together with the method of proceeding, rest entirely in the breast of the parliament itself; and are not defined and ascertained by any particular stated laws.

The privileges of parliament.

The *privileges* of parliament are likewise very large and indefinite. And therefore when in 31 Hen. VI. the house of lords propounded a question to the judges concerning them, the chief justice, Sir John Fortescue, in the name of his brethren, declared, "that they ought not to make answer [164] "to that question: for it hath not been used aforetime that "the justices should in any wise determine the privileges "of the high court of parliament. For it is so high and "mighty in its nature, that it may make law: and that "which is law, it may make no law: and the determination "and knowledge of that privilege belongs to the lords of "parliament, and not to the justices."[x] Privilege of parliament was principally established, in order to protect its members not only from being molested by their fellow-subjects, but also more especially from being oppressed by the power of the crown. If therefore all the privileges of parliament were once to be set down and ascertained, and no privilege to be allowed but what was so defined and determined, it were easy for the executive power to devise some new case, not within the line of privilege, and under pretence thereof to harass any refractory member and violate the freedom of parliament. The dignity and independence of the two houses are therefore in great measure preserved by keeping their privileges indefinite. Some however of the more notorious privileges of the members of either house are, privilege of speech and of person, for those as to their domestics, lands, and goods, which formerly existed, have been abolished.[y] As to the first, privilege of speech, it is declared by the statute 1 W. & M. st. 2, c. 2, as one of the liberties of the people, "that the freedom of speech, and debates, "and proceedings in parliament, ought not to be impeached "or questioned in any court or place out of parliament."

Of speech and of person.

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[x] Seld. Baronage, part. 1. c. 4.

[y] 10 Geo. III. c. 50.

And this freedom of speech is particularly demanded of the king in person, by the speaker of the house of commons, at the opening of every new parliament. So likewise is the other privilege, of person, which is an immunity as ancient as Edward the confessor; in whose laws[y] we find this precept, "*ad synodus venientibus, sive summoniti sint, sive per* "*se quid agendum habuerint, sit summa pax:* and so too, in the old Gothic constitutions, "*extenditur hæc pax et secu-* "*ritas ad quatuordecim dies, convocato regni senatu.*"[z] This included formerly not only privilege from illegal violence, [165] but also from legal arrests, and seisures by process from the courts of law. And still, to assault by violence a member of either house, or his menial servants, is a high contempt of parliament, and there punished with the utmost severity. It has likewise peculiar penalties annexed to it in the courts of law, by the statutes 5 Hen. IV. c. 6, and 11 Hen. VI. c. 11. Neither can any member of either house be arrested and taken into custody, unless for some indictable offence, without a breach of the privilege of parliament.

All other personal privileges have been abolished.

But all other privileges, which derogate from the common law in matters of civil right, are now at an end, save only as to the freedom of the member's person: which in a peer (by the privilege of peerage) is for ever sacred and inviolable; and in a commoner (by the privilege of parliament) for forty days after every prorogation, and forty days before the next appointed meeting:[a] which is now in effect as long as the parliament subsists, it seldom being prorogued for more than fourscore days at a time. As to all other privileges which obstruct the ordinary course of justice, they were restrained by the statutes 12 W. III. c. 3, 2 & 3 Ann. c. 18, and 11 Geo. II. c. 24, and are now totally abolished by statute 10 Geo. III. c. 50, which enacts, that any suit may at any time be brought against any peer or member of parliament, their servants, or any other person entitled to privilege of parliament; which shall not be impeached or delayed by pretence of any such privilege; except that the person of a member of the house of commons shall not thereby be subjected to any arrest or imprisonment. Likewise for the benefit of commerce, it is provided by statute 4 Geo. III.

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[y] *cap.* 3.

[z] Steiran. *de jure Goth. l.* 3. *c.* 3.

[a] 2 Lev. 72.

c. 33, amended by the 45 Geo. III. c. 124, s. 1, that any trader, having privilege of parliament, may be served with legal process for any just debt to the amount of 100*l.*, and unless he make satisfaction within two months, it shall be deemed an act of bankruptcy: and commissions of bankrupt may be issued against such privileged traders, in like manner as against any other; and by the 6 Geo. IV. c. 16, s. 11, the time for making satisfaction is reduced to *one* month, and by this statute the proceeding against members is in other respects facilitated. Further by the 52 Geo. III. c. 24, if a member of the house of commons be declared a bankrupt, and the commission be not superseded within twelve months, nor debts paid, nor security given for debts disputed, and costs, the commissioners shall certify the same to the speaker, and the election of such member shall be declared void. The privilege of the house of commons to publish in its reports, votes, and proceedings, matter which elsewhere would be libellous, has recently been much discussed. The question having been raised by an action being brought against the authorized publisher of the proceedings of the house of commons for an alleged libel contained in one of its reports, Lord Denman, C. J. sitting at *nisi prius*,[b] held that the house of commons had no privilege of this kind. The house has, however, asserted its right, and declared that "for any court or tribunal to assume to decide upon matters of privilege inconsistent with the determination of either house of parliament, is contrary to the laws of parliament, and is a breach of the privilege of parliament,"[c] nor is it without authority[d] in asserting this privilege.

Members of the house of commons becoming bankrupts.

The privilege of publishing its proceedings.

The mode of taking cognizance of privilege.

The only way by which courts of justice could anciently take cognizance of privilege of parliament was by writ of privilege, in the nature of a *supersedeas*, to deliver the party out of custody when arrested in a civil suit.[e] For when a [166] letter was written by the speaker to the judges, to stay proceedings against a privileged person, they rejected it as contrary to their oath of office.[f] But since the statute 12

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[b] *Stockdale* v. *Hansard*, 7 C. & P. 737.

[c] Report of Select Committee, 1837.

[d] *Rex* v. *Wright*, 8 T. R. 294. The point still stands for further argument before the court of Queen's Bench.

[e] Dyer 59 4 Pryn. *Brev. Parl.* 757.

[f] Latch. 48 Noy. 83.

W. III. c. 3, which enacts that no privileged person shall be subject to arrest or imprisonment, it hath been held that such arrest is irregular *ab initio,* and that the party may be discharged upon motion.[g] It is to be observed, that there is no precedent of any such writ of privilege, but only in civil suits; and that the statute of 1 Jac. I. c. 13, and that of king William (which remedy some inconveniences arising from privilege of parliament) speak only of civil actions. And therefore the claim of privilege hath been usually guarded with an exception as to the case of indictable crimes;[h] or as it hath been frequently expressed, of treason, felony, and breach (or surety) of the peace.[i] Whereby it seems to have been understood that no privilege was allowable to the members, their families, or servants, in any *crime* whatsoever; for all crimes are treated by the law as being *contra pacem domini regis.* And instances have not been wanting, wherein privileged persons have been convicted of misdemeanors, and committed, or prosecuted to outlawry, even in the middle of a session;[j] which proceeding has afterwards received the sanction and approbation of parliament.[k] To which may be added, that, a few years ago, the case of writing and publishing seditious libels was, contrary however to the opinion of the court of common pleas,[l] resolved by both houses[m] not to be entitled to privilege; and that the reasons upon which that case proceeded,[n] extended equally to every indictable offence. So that the chief, if not the only, privilege of parliament, in such cases, seems to be the right of receiving immediate information of the imprisonment or detention of any member, with the reason for which he is detained: a practice that is daily used upon [167] the slightest military accusations, preparatory to a trial by a court martial;[o] and which is recognized by the several temporary statutes for suspending the *habeas corpus* act:[p]

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[g] Stra. 989.

[h] Com. Journ. 17 Aug. 1641.

[i] 4 Inst. 25. Com. Journ. 20 May 1675.

[j] *Mich.* 16 *Edw. IV. in Scacch.*— Lord. Raym. 1461.

[k] Com. Journ. 16 May 1726.

[l] 2 Wils. 251.

[m] Com. Journ. 24 Nov. Lords' Journ. 29 Nov. 1763.

[m] Lords' Protest. *ibid.*

[n] Com. Journ. 20 Apr. 1762.

[o] particularly 17 Geo. II. c. 6.

whereby it is provided, that no member of either house shall be detained, till the matter of which he stands suspected, be first communicated to the house of which he is a member, and the consent of the said house obtained for his commitment or detaining. But yet the usage has uniformly been, ever since the Revolution, that the communication has been subsequent to the arrest.

These are the general heads of the laws and customs relating to parliament, considered as one aggregate body. We will next proceed to

IV. The laws and customs relating to the house of lords.

IV. The laws and customs relating to the house of lords in particular. These, if we exclude their judicial capacity, of which it is not our present purpose to treat, will take up but little of our time.

The killing two of the king's deer.

One very ancient privilege is that declared by the charter of the forest,[p] confirmed in parliament 9 Hen. III.; *viz.* that every lord spiritual or temporal summoned to parliament, and passing through the king's forest, may, both in going and returning, kill one or two of the king's deer without warrant; in view of the forester if he be present, or on blowing a horn if he be absent: that he may not seem to take the king's venison by stealth.

The being attended by the judges, &c.

In the next place they have a right to be attended, and constantly are, by the judges of the court of king's bench and common pleas, and such of the barons of the exchequer as are of the degree of the coif, or have been made serjeants at law; as likewise by the king's learned counsel, being serjeants, and by the masters of the court of chancery; for their advice in point of law, and for the greater dignity of their proceedings. The secretaries of state, with the attorney and solicitor-general, were also used to attend the house of peers, and have to this day (together with the judges, &c.) their regular writs of summons issued out at the beginning of every parliament,[q] *ad tractandum et consilium* [168] *impendendum*, though not *ad consentiendum;* but, whenever of late years they have been members of the house of commons,[r] their attendance here hath fallen into disuse.

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[p] c. 11.

[q] Stat. 31 Hen. VIII. c. 10. Smith's commonw. b. 2. c. 3. Moor. 551. 4 Inst. 4. Hale of Parl. 140.

[r] See Com. Journ. 11 Apr. 1614. 8 Feb. 1620. 10 Feb. 1625. 4 Inst. 48.

The power of making proxies.

Another privilege is, that every peer, by licence obtained from the king, may make another lord of parliament his proxy, to vote for him in his absence.[s] A privilege, which a member of the other house can by no means have, as he is himself but a proxy for a multitude of other people.[t] It is to be observed, however, that a proxy is of no avail in a committee of the house, and that it has been ordered that no lord shall have more than two proxies.[u]

The power of entering his protest.

Each peer has also a right, by leave of the house, when a vote passes contrary to his sentiments, to enter his dissent on the journals of the house, with the reasons for such dissent; which is usually styled his protest.

That all bills which affect the peerage shall originate in the house of peers.

All bills likewise, that may in their consequences any way affect the rights of the peerage, are by the custom of parliament to have their first rise and beginning in the house of peers, and to suffer no changes or amendments in the house of commons.

The statute as to the election of the Scotch and Irish peers.

There are also some statutes peculiarly relative to the house of lords; 6 Ann. c. 23, and 2 & 3 Wm. IV. c. 63 which regulate the election of the sixteen representative peers of North Britain, in consequence of the twenty-second and twenty-third articles of the union: and for that purpose prescribes the oaths, &c. to be taken by the electors; directs the mode of balloting; prohibits the peers electing from being attended in an unusual manner; and expressly provides, that no other matter shall be treated of in that assembly, save only the election on pain of incurring a *præmunire*. And by the 4th article of the act for effecting the union between England and Ireland, which we have already stated,[v] provision is made for the election of four spiritual and twenty-eight temporal lords to sit and vote on the part of Ireland. The Scotch peers are elected only for one parliament; the Irish peers for life.

V. The peculiar laws of the house of commons

V. The peculiar laws and customs of the house of commons relate principally to the raising of taxes, and the elections of members to serve in parliament.

as to taxes.

First, with regard to taxes; it is the ancient indisputable privilege and right of the house of commons, that all grants of subsidies or parliamentary aids do begin in their house, and are first bestowed by them;[w] although their grants are not effectual to all intents and purposes, until they have the [169] assent of the other two branches of the legislature. The general reason, given for this exclusive privilege of the house of commons, is, that the supplies are raised upon the body of the people, and therefore it is proper that they alone should have the right of taxing themselves. This reason would be unanswerable, if the commons taxed none but themselves: but it is notorious, that a very large share of property is in the possession of the house of lords; that this property is equally taxable, and taxed, as the property of the commons; and therefore the commons not being the *sole* persons taxed, this cannot be the reason of their having the *sole* right of raising and modelling the supply. The true reason, according to Blackstone, arising from the spirit of our constitution, is this. The lords being a permanent hereditary body, created at pleasure by the king, are supposed more liable to be influenced by the crown, and when once influenced to continue so, than the commons, who are a temporary elective body, freely nominated by the people. It would therefore be extremely dangerous, to give the lords any power of framing new taxes for the subject; it is sufficient that they have a power of rejecting, if they think the commons too lavish or improvident in their grants. A later writer gives another reason. He treats it as arising from the commons regulating their conduct as to taxes by the instructions of their constituents; it was therefore a saving of time to originate measures of this sort in that house.[x] But so reasonably jealous are the commons of this valuable privilege, that herein they will not suffer the other house to exert any power but that of rejecting; they will not permit the least alteration or amendment to be made by the lords to the mode of taxing the people by a money bill; under which appellation are included all bills, by which money is directed to be raised upon the subject, for any purpose or in any shape whatsoever; either for the exigencies of government, and collected from the kingdom in general, as the land tax; or for private benefit, and collected in any particular district, as by turnpikes, parish rates, and the like; and the rule is now extended to all bills for canals, paving, provision for the poor, and to every bill in which tolls, rates, or duties are ordered to be collected, and also to all bills by which pecuniary penalties and fines are imposed for offences.[y] Yet sir Matthew Hale[z] mentions one case, founded on the practice of parliament in the reign of Henry VI.,[a] wherein he thinks the lords may alter a money bill: and [170] that is, if the commons grant a tax, as that of tonnage and poundage, for *four years;* and the lords alter it to a less time, as for *two* years; here, he says, the bill need not be sent back to the commons for their concurrence, but may receive the royal assent without farther ceremony; for the alteration of the lords is consistent with the grant of the commons. But such an experiment will hardly be repeated by the lords, under the present improved idea of the privilege of the house of commons, and, in any case where a money bill is remanded to the commons, all amendments in the mode of taxation are sure to be rejected.

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[s] Seld. Baronage, p. 1. c. 1.

[t] 4 Inst. 12.

[u] Lord Mountmorris, 106. 2 *Id.* 191. 1 Rushw. 269.

[v] *Ante*, p. 97. See also p. 88.

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[w] 4 Inst. 29.

[x] Miller on Gov. p. 398.

As to the election of members of the house of commons.

Next, with regard to the elections of knights, citizens, and burgesses; we may observe, that herein consists the exercise of the democratical part of our constitution: for in a democracy there can be no exercise of sovereignty but by suffrage, which is the declaration of the people's will. In all democracies therefore it is of the utmost importance to regulate by whom, and in what manner, the suffrages are to be given. And the Athenians were so justly jealous of this prerogative, that a stranger, who interfered in the assemblies of the people, was punished by their laws with death: because such a man was esteemed guilty of high treason, by usurping those rights of sovereignty, to which he had no title. In England, where the people do not debate in a collective body but by representation, the exercise of this sovereignty consists in the choice of representatives. The laws have therefore very strictly guarded against usurpation or abuse of this power, by many salutary provisions; which may be reduced to these three points, 1. The qualifications of the electors. 2. The qualifications of the elected. 3. The proceedings at elections.

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[y] 3 Hats. 110.

[z] on parliaments. 65, 66.

[a] Year book, 33 Hen. VI. 17. But see the answer to this case by Sir Heneage Finch. Com. Journ. 22 Apr. 1671.

1. The qualifications of the electors.

1. As to the qualifications of the electors. The true reason of requiring any qualification, with regard to property, in voters, is to exclude such persons as are in so mean a situation that they are esteemed to have no will of their own. If these persons had votes, they would be tempted to dispose of them under some undue influence or other. This would give a great, an artful, or a wealthy man, a larger share in elections than is consistent with general liberty. If it were probable that every man would give his vote freely and without influence of any kind, then, upon the true theory and [171] genuine principles of liberty, every member of the community, however poor, should have a vote in electing those delegates, to whose charge is committed the disposal of his property his liberty, and his life. But, since that can hardly be expected in persons of indigent fortunes, or such as are under the immediate dominion of others, all popular states have been obliged to establish certain qualifications; whereby some, who are suspected to have no will of their own, are excluded from voting, in order to set other individuals, whose wills may be supposed independent, more thoroughly upon a level with each other.

The advantages of the British mode of suffrage.

And this constitution of suffrages is framed upon a wiser principle, with us, than either of the methods of voting, by centuries or by tribes, among the Romans. In the method by centuries, instituted by Servius Tullius, it was principally property, and not numbers, that turned the scale: in the method by tribes, gradually introduced by the tribunes of the people, numbers only were regarded, and property entirely overlooked. Hence the laws passed by the former method had usually too great a tendency to aggrandize the patricians or rich nobles; and those by the latter had too much of a levelling principle. Our constitution steers between the two extremes. Only such are entirely excluded, as can have no will of their own: there is hardly a free agent to be found, who is not entitled to a vote in some place or other in the kingdom. Nor is comparative wealth or property, entirely disregarded in elections; for though the richest man has only one vote at one place, yet, if his property be at all diffused, he has probably a right to vote at more places than one, and therefore has many representatives. "This," said Blackstone, "is the spirit of our "constitution: not that I assert it is in fact quite so perfect[b] "as I have here endeavoured to describe it; for, if any [172] "alteration might be wished or suggested in the present "frame of parliaments, it should be in favour of a more "complete representation of the people."

The introduction of the Reform Act, 2 & 3 W. 4, c. 45.

And the present generation has seen the consummation of this wish, by the successful introduction of a measure having this great end in view; I mean the Reform Act, 2 & 3 Wm. IV. c. 45, the most important alteration perhaps ever made in the constitution. This act must now be considered the chart by which a true knowledge of the law and practice of the house of commons is to be acquired, and in this portion of the present chapter, although I think it is useful, still to show how the law stood before the Reform Act was passed, as much of it is still in force, yet a full reference must be made to the provisions of that act, to see how the law stands at the present day.

The qualifications of electors of knights of the shire.

But to return to our qualifications; and first those of electors for knights of the shire. 1. By statute 8 Hen. VI. c. 7, and 10 Hen. VI. c. 2, (amended by 14 Geo. III. c. 58) the knights of the shire were to be chosen of people, whereof every man should have freehold to the value of forty shillings by the year within the county; which (by subsequent statutes) was to be clear of all charges and deductions, except parliamentary and parochial taxes. The knights of shires having always been the representatives of the landholders, or landed interest of the kingdom: their electors must therefore have had estates in lands or tenements, within the county represented: these estates must have been freehold, that is, for term of life at least; because beneficial leases for long terms of years were not in use at the making of these statutes, and copyholders were then little better than villeins, absolutely dependent upon their lords: this freehold must have been of forty shillings annual value: because that sum would then, with proper industry furnish all the necessaries of life, and render the freeholder, if he pleased, an independent man. For bishop Fleetwood, in his *Chronicon Preciosum,* written at the beginning of the present century, has fully proved forty shillings in the reign of Henry VI. to have been equal to twelve pounds *per annum* in the reign of queen Anne; and, as the value of money is very considerably lowered since the bishop wrote, I think we may fairly conclude, from this and other circumstances, that what was equivalent to twelve pounds in his days is equivalent to twenty at present. The other less important qualifications of the electors for counties in England and Wales, before the passing of the Reform Act, may be collected from the statutes cited in the margin:[c] which direct, 2. That no person under twenty-one years of age, alien, idiot, or lunatic, should be capable of voting for any member. This extended to all sorts of members, as well for boroughs as counties; as did also the next, *viz.* 3. That no person convicted of perjury, or subornation of perjury, should be capable of voting in any election. [173] 4. That no person should vote in right of any freehold, granted to him fraudulently to qualify him to vote. Fraudulent grants were such as contain an agreement to reconvey, or to defeat the estate granted; which agreements were made void, and the estate was absolutely vested in the person to whom it was so granted. And, to guard the better against such frauds, it was farther provided, 5. That every voter should have been in the actual possession, or receipt of the profits, of his freehold to his own use for twelve calendar months before; except it came to him by descent, marriage, marriage-settlement, will, or promotion to a benefice or office. 6. That no person should vote in respect of an annuity or rent-charge, unless issuing out of a freehold estate, and registered with the clerk of the peace twelve calendar months before. 7. That in mortgaged or trust estates, the person in possession under the above mentioned restrictions, should have the vote. 8. That only one person should be admitted to vote for any one house or tenement, to prevent the splitting of freeholds. 9. That no estate should qualify a voter, unless the estate had been assessed to some land tax aid, at least twelve months before the election. And by statute 20 Geo. III. c. 17, explained and amended by 30 Geo. III. c. 35, no person was allowed to vote in respect of any messuages, lands, or tenements, which had not been assessed to the land tax for six calendar months next before such election, either in the name of the person claiming to vote, or of the tenant actually occupying the same at the time of such assessment made; and no person was allowed to vote in respect of any messuages, &c. to which the person so claiming to vote should have become entitled by descent, marriage, marriage-settlement, devise, promotion to any benefice or office, within twelve calendar months next before such election, which messuages, &c. had not been assessed to the land tax within two years next before such election in the name of the person through whom the person claiming to vote should derive his title. 10. That no tenant by copy of court roll should be permitted to vote as a freeholder. 11. And by statute 22 Geo. III. c. 41, it was enacted, that no commissioner or officer, employed in managing the duties of excise, customs, stamps, salt, windows, or houses, or revenue of the post-office, should be capable of voting in the election of a member of parliament.

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[b] "The candid and intelligent "reader will apply this observation," said Blackstone, "to many other parts "of the work before him, wherein the "constitution of our laws and government are represented as nearly approaching to perfection; without descending to the invidious task of "pointing out such deviations and corruptions, as length of time and a "loose state of national morals have "too great a tendency to produce. "The incurvations of practice are then "the most notorious when compared "with the rectitude of the rule; and "to elucidate the clearness of the "spring, conveys the strongest satire "on those who have polluted or disturbed it." The attentive reader cannot fail here to observe, that since the time of Blackstone there have been many improvements made in the constitution, and none greater than the Reform Act (2 & 3 W. IV. c. 45), which has done so much to secure "a "more complete representation of the "people."

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[c] 7 & 8 W. III. c. 25. 10 Ann. c. 18. 31 Geo. II. c. 14. 3 Geo. III. c. 23. 2 Geo. II. c. 21. 18 Geo. II. c. 24.

Alterations made by the Reform Act.

But by the Reform Act, very considerable alterations have been made as to the qualifications of electors for knights of the shire. In the first place, however, it is to be observed that by that act, s. 75, all statutes then in force, respecting the election of members to serve in parliament, shall remain in force, except so far as any of the said statutes are repealed by or are inconsistent with the provisions of the act. Where therefore the statutes now just mentioned, are not inconsistent with the following provisions, they are still in force. By s. 18 of the 2 & 3 Wm. IV. c. 45, no person shall be entitled to vote in the election of a knight of the shire, in respect of any freehold lands whereof such person may be seised for his own life, or for the life of another, except such person shall be in the actual occupation of such lands, or except the same shall have come to such person by marriage, marriage-settlement, devise, or promotion to any benefice or office, or except the same shall be of the clear yearly value of not less than 10*l.* above all rents and charges; but nothing in the act is to prevent the person who had the right of voting at the time of passing the act from retaining such right for their lives. By s. 19, every male person of full age, and not subject to any legal incapacity, who shall be seised at law or in equity of any lands of copyhold or any other tenure, except freehold, for his own life or for the life of another, or for any larger estate of the clear yearly value of not less than 10*l.* above all rents and charges, shall be entitled to vote in the election of a knight of the shire. By s. 20, every male person of full age, and not subject to any legal incapacity, who shall be entitled either as lessee or assignee to any lands or tenements, whether of freehold, or of any other tenure whatever, for the unexpired residue of any term of not less than sixty years, of the clear yearly value of not less than 10*l.* over and above all rents and charges, or for the unexpired residue of any term originally created for a period of not less than twenty years, of the clear yearly value of not less than 50*l.* above all rents and charges, or who shall occupy as tenant any lands or tenements for which he shall be liable to a yearly rent of not less than 50*l.*, shall be entitled to vote for knights of the shire; but no person being only a sub-lessee, or the assignee of any under-lease, shall have a right to vote in respect of any such term of fifty years, or twenty years, unless he shall be in the actual occupation of the premises. By s. 21, no public or parliamentary tax, nor any church rate, county rate, or parochial rate, shall be deemed to be any charge within the meaning of the act. By s. 22, county voters need not be assessed to the land tax. By s. 23, no person is to have any vote for a knight of the shire, by reason of any trust estate or mortgage, unless in the actual possession of the rents and profits; but the mortgagor, or *cestui que trust* in possession shall vote for the estate, notwihtstanding such mortgage or trust. By s. 26, no person is to vote for a county in respect of a freehold house, &c., occupied by himself, which would confer a vote for a borough. By s. 25, no person is to vote for a county in respect of copyholds and leaseholds which would confer a vote for a borough; and further by s. 26, no person shall be entitled to vote for a knight of the shire, unless he shall have been duly registered; and no person shall be registered unless he shall have been in the actual possession of the house, or in the receipt of the rents and profits thereof for his own use, for six calendar months at least next previous to the last day of July in such year; except where the property shall have come to such person by descent, marriage, devise, or promotion to any benefice. Thus much for the electors in counties.

Qualification of electors of citizens and burgesses.

As for the electors of citizens and burgesses, these are supposed to be the mercantile part or trading interest of this kingdom. But as trade is of a fluctuating nature, and seldom long fixed in a place, it was formerly left to the [174] crown to summon, *pro re nata*, the most flourishing towns to send representatives to parliament. So that as towns increased in trade, and grew populous, they were admitted to a share in the legislature. But the misfortune was, that the deserted boroughs continued to be summoned, as well as those to whom their trade and inhabitants were transferred; except a few which petitioned to be eased of the expense, then usual, of maintaining their members: four shillings a day being allowed for a knight of the shire, and two shillings for a citizen or burgess: which was the rate of wages established in the reign of Edward III.[d] Hence the members for boroughs, until the Reform Act, bore above a quadruple proportion to those for counties, and the number of parliament men increased since Fortescue's time, in the reign of Henry the sixth, from 300 to upwards of 500, exclusive of those for Scotland and Ireland. The universities were in general not empowered to send burgesses to parliament; though once, in 28 Edw. I. when a parliament was summoned to consider of the king's right to Scotland, there were issued writs, which required the university of Oxford to send up four or five, and that of Cambridge two or three, of their most discreet and learned lawyers for that purpose.[e] But it was king James the first, who indulged them with the permanent privilege to send constantly two of their own body: to serve for those students who, though useful members of the community, were neither concerned in the landed nor the trading interest; and to protect in the legislature the rights of the republic of letters. And by the Reform Act, s. 78, the right of returning members by these universities is expressly continued. The right of election in boroughs is various, depending entirely on the several charters, customs, and constitution of the respective places, which has occasioned infinite disputes; though by statute 2 Geo. II. c. 24, it was enacted that the right of voting for the future should be allowed according to the last determination of the house of commons concerning it. And by statute 3 Geo. III. c. 15, no freeman of any city or borough (other than such as claim by birth, marriage, or servitude) was to be entitled to vote therein, unless he hath been admitted to his freedom twelve calendar months before. And by statute 26 Geo. III. c. 100, no person was admitted to vote at any election of members for any city or borough within England and Wales, as an inhabitant paying scot and lot, or as an inhabitant householder, housekeeper, and potwaller, legally settled; or as an inhabitant householder, housekeeper, and potwaller; or as an inhabitant householder resident; or as an inhabitant of such city or borough (other than such as claim by descent, devise, marriage, or marriage-settlement, or promotion to any office or benefice, or under any other description than inhabitants paying scot and lot, or inhabitants in the manner above described) unless he should have been actually and *bonâ fide* an inhabitant as above, six calendar months previous to the day of the election, at which he should tender his vote; and if any person should vote at any such election contrary to the said act, his vote should be null and void, and he should forfeit 20*l.* to any person who should sue for the same, to be recovered by action of debt in any of the courts at Westminster; in which action the proof of inhabitancy should lie upon the person sued.

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[d] 4 Inst. 16.

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[e] Prynne parl. writs. I. 345.

Alterations as to this by the Reform Act.

The alterations, however, made by the Reform Act as to the representation of boroughs are even greater than those made as to counties. In the first place, the deserted boroughs were either wholly or partially disfranchised. By s. 1, and schedule A. to which it referred, fifty-six decayed boroughs ceased, after the passing of this act, to return members to parliament; and by s. 2, and schedule B. to which it referred, thirty other small boroughs, which before the act returned two members, now send only one. The number of representatives thus gained was given, in a great part, to other boroughs (forty-three new boroughs being created) having a larger population (ss. 3 & 4,) twenty-two of which were to return two members, and twenty-one one member each; but the proportion for the counties was also much increased, Yorkshire gaining two, and thus returning six members instead of four (s. 12.); the county of Lincoln gaining two, and thus returning four members instead of two (s. 13.); twenty-five other counties being divided into two divisions, each division returning two members each, instead of two members for the whole county (s. 14. and schedule F.); seven other counties returning three instead of two members (s. 15. and schedule F. 2.); and three others returning two instead of one member (s. 15); besides many minor alterations. The whole number of members to be returned for England was also reduced from 513 to 500; but the number to be returned for Scotland and Ireland was increased,[f] making in the whole the same number of representatives as before the passing of the Reform Act.

But these extensive alterations were by no means all that was done affecting the representation of boroughs in parliament. The qualification of the electors was greatly extended. By s. 27, every male person not subject to any legal incapacity, who shall occupy, as owner or tenant, any house or building, either separately or jointly with any land, within a borough, of the clear yearly value of not less than 10*l.* shall, if duly registered, be entitled to vote for a member for such borough; but no occupier is to vote unless rated to the poor rate; and all the poor's rates and assessed taxes payable from him in respect of such premises previously to the 6th of April shall be paid on or before the 20th of July in each year; and residence for six months previous to the 1st day of July in each year is also required. By s. 29 joint occupiers may vote, in case the clear yearly value shall be of an amount which, when divided by the number of such occupiers, shall give a sum not less than 10*l.* for every occupier. By s. 30, occupiers may also demand to be rated. By s. 32, freemen of boroughs are entitled to vote, provided they shall be registered and have been resident within the borough six calendar months previous to the last day of July in each year, but not otherwise; and freemen created since the 1st of March, 1831, are excluded. By s. 33, every person having a right to vote at the time of passing this act in virtue of any other qualification, shall retain such right of voting so long as he shall be qualified as an elector, according to the usages and customs of the city or borough for which he claims to vote, provided he is registered and resident. But by s. 36, no person shall be entitled to be registered who shall, within twelve calendar months next previous to the last day of July in any year, have received parochial relief.

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[f] See *ante*, p. 154.

A register of voters established by the Reform Act.

But means were also taken by the Reform Act to establish a register of voters, both for counties and boroughs, for which no provision at all was made by the former acts, and which is a very great improvement in the law on this subject. It will be well to give a pretty full account of this important change.

Mode in which it is prepared and revised. 1. for counties

And, first, as to counties. On the 20th of June in every year the overseers of the parish are to fix upon all the church and chapel doors in their parish, or, if there be no church or chapel in the parish, then in some public conspicuous place, a notice to all persons claiming to vote for the county or division in respect of lands or tenements situate wholly or in part within their parish or township, requiring them to send, on or before the 20th of July, to them, the overseers, a notice of their claim as such voters (s. 37). They are then to make out, on or before the last day of July, an alphabetical list of all persons claiming to vote for the members or member of the county in which their parish or township lies, in respect of lands or tenements situate within such parish or township (s. 38). The claim to vote must be sent in to the overseers on or before the 20th of July, in order to entitle voters to be described on the list for such year. It must be accompanied with the payment of one shilling to the overseers (s. 56). And in every succeeding year a fresh list, containing the names of all voters previously described on the register, and also the names of all persons sending in their claim, are to be inscribed on the fresh list (s. 38). Persons having once sent in their claim to the overseers, and being inscribed on the register, are not required to send in such notice of their claim in any ensuing year, provided they retain the same qualification, and continue in the same place of abode described in the former register (s. 37). The overseers are then to write at full length, in every such list, the christian and surname of every person, his place of abode, the nature of his qualification, and the local and other description of his lands and tenements, as the same are respectively set forth in his claim to vote (s. 38). If they have reasonable cause to believe that any person claiming to vote, or whose name is already on the register, is not entitled to vote, they may add the words "objected to" opposite the name of every such person, on the margin of the list (s. 38). They are then to sign the list when made out; to have a sufficient number of copies written or printed; to fix copies on the church and chapel doors in their parish, or, if there be no church or chapel in the parish, in some public conspicuous place, on the two Sundays next after the list shall have been made. They are also to keep a true copy of the list, to be inspected by any person without payment of any fee, at all reasonable hours, during the two first weeks after the list shall have been made (s. 38). The lists of the voters, and of those objected to, are then to be forwarded to the clerks of the peace, who shall transmit the same to the barrister appointed under the act to revise the lists, (s. 40). The barrister is to be appointed, if for *Middlesex*, by the Chief Justice of the King's Bench, and, for every other county, by the senior judge for the time being in the commission of assize; and such barrister shall give public notice that he will make a circuit of the county, and of the times and places at which he will hold courts for the purpose of revising the lists, such times being between the 15th of September and the 25th of October.[g] The clerk of the peace shall at such court produce the several lists of voters, and the overseers shall attend the court, and deliver to the barrister a copy of the list of the persons objected to, and shall answer upon oath all questions which the barrister may put. The barrister shall retain on the lists of voters the names of all persons to whom no objection shall have been made by the overseers, and of every person objected to by third persons, if they shall not appear in support of their objection, but when the objection is supported, the barrister shall inquire into its validity, and if it shall be proved to his satisfaction, the barrister shall expunge the name from the list, as also the names of persons who are dead, and rectify mistakes and supply omissions, (s. 42). By s. 43, the barrister shall have power to insert in the county lists the names of claimants omitted by the overseers, on proof of claim and qualification.

Revision of lists.

Secondly, as to Boroughs.—The overseers are to make out on or before the 31st of July in each year, an alphabetical list of all persons entitled to vote for the city or borough in which their parish or township is situate, in respect of the occupation of any premises of the yearly value of 10*l.* (s. 44), and to make another alphabetical list of all other persons (except freemen) entitled to vote for the city or borough in which their parish or township is situate, in virtue of any right whatsoever other than that arising from the occupa-

2. For boroughs.

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[g] In the year 1836, the revision of voters was made between the 15th day of October and the 25th day of November, under the stat. 6 & 7 W. IV. c. 101.

tion of any premises of the yearly value of 10*l.*; and to write in such lists the christian and surnames of every person at full length, together with the nature of his qualification, (s. 44). And where any person is entitled to vote otherwise than in respect of property, the overseers are to specify the street or lane, or some other description of such voter's abode. The overseers are to sign both these lists, to have a sufficient number of copies of them printed, and to fix them on or near all the church and chapel doors in the parish or township, or in some public conspicuous place, on the two Sundays next after such lists shall have been made. They are also to keep true copies of such lists to be inspected by any person without payment of fee, at all reasonable hours, during the two first weeks after such lists shall have been made, (s. 44). The notice to be given by the overseers to voters for counties, and the notice of such claims required by the overseers, are neither of them required by that part of the act which refers to the registration of voters for cities and boroughs; but if any voter is omitted in the overseer's list, and claims to have his name inserted as entitled under this act, on the 31st of July last preceding, he is to give, on or before the 25th of *August* in each year, a notice in writing to the overseers of the parish or township in respect of which he claims to vote. Any person whose name is on the list may object to the name of any other person as not entitled to vote. Such objection must be in writing and sent to the overseers on or before the 25th of August in each year, (s. 47). Overseers are to make out a list of persons so claiming to vote, and a list of persons objected to, (s. 47). They are to fix these lists on the doors of all churches and chapels, and if there be no churches or chapels, in some public and conspicuous place on the two Sundays next preceding the 15th of September in each year, (s. 47). They are to keep a copy of such lists to be inspected without fee by any person, and to provide copies for sale on payment of one shilling each, (s. 47). They are to attend at the first court of the barrister appointed to revise the list of voters, and to produce their lists before him, and a copy of the list of persons claiming and objected to, and to answer upon oath any question put to them by such barrister on matters connected therewith, (s. 50). The expences of overseers are to be defrayed as is mentioned in s. 56. The duty of registering freemen in cities and boroughs is imposed on the town-clerk; or if there be no town-clerk, or he be dead or incapable of acting, on the person executing duties similar to those of the town-clerk; or if there be no such person, on the chief civil officer of the place, (s. 46). The officer is to make a list of such freemen on or before the 31st of *July* in every year, to fix a copy of such list on the door of the town-hall, or in some conspicuous situation, two Sundays next after such list shall have been made, and to keep a copy, to be perused without fee at all reasonable hours during the two first weeks after the making of such list, (s. 46). Any freeman omitted in the list and claiming to be inserted, is to give notice in writing to the town-clerk on or before the 25th of August in every year, (s. 47): and any person inserted in the list of freemen, may object to any other person as not entitled, by giving a notice in writing: and the town-clerk is to make a list of all persons so claiming, and another of the persons so objected to; and shall fix copies of such lists on the door of the town-hall or in some conspicuous public place two Sundays next before the 15th of September in each year, (s. 47). And the town-clerk is to keep a copy of such lists for perusal at all reasonable hours, without fee, for ten days before the 15th of September in each year, and is to provide copies for sale on payment of one shilling each, (s. 47). The town-clerk is to attend the first court of the revising-barrister to produce like lists of freemen, and copies of the lists of all persons claiming and objected to, and is to answer upon oath any question put to him by the barrister respecting matters connected therewith, (s. 50).

Revision of lists.

By s. 49, the barristers are to be appointed in the same manner as for counties, to revise the respective lists of voters for the cities and boroughs; and he is to proceed as before described respecting counties, (s. 50). To assist in making out the lists, overseers may inspect tax assessments and rate-books, (s. 51). And the barrister has power to adjourn the court, to administer oaths, and finally to determine and settle all objections, and settle and sign the lists in open court, (s. 52); and the judges may appoint additional barristers in case of need, (s. 53). When the lists shall have been so signed, if of county voters, they shall be transmitted to the clerk of the peace; if of borough voters, to the returning officer, who shall keep them among the records of the sessions, and cause them to be copied into books and numbered; and such books shall form the register of the electors, (s. 54): and copies of the lists and of the registers are to be printed and sold for a reasonable price to all persons applying for them, (s. 55).

Expences.

By s. 56, the expences of the overseers and clerk of the peace are to be defrayed by the payment of one shilling to such overseer by every person giving notice of his claim as an elector for a county, and every elector for a city or borough shall pay one shilling annually, which shall respectively form a fund from which the expenses shall be defrayed. By s. 57, every barrister shall be paid by government at the rate of five guineas a-day, when he shall be employed, over and above his travelling expences. The correctness of the register may be impeached before a committee of the house of commons, by any person complaining by petition of an undue return of any member, (s. 60). And any barrister or overseer who shall wilfully disobey the provisions of this act is liable to be sued for 500*l.* (s. 76).

By a very recent statute, 1 & 2 Vict. c. 35, no stamp duty is to be chargeable on the admission of freemen in cities and boroughs.

Other disqualifications from voting.

There are some further statutory disqualifications from voting which should be mentioned, and which are equally applicable to voting for boroughs as counties. Thus no justice, receiver, or constable employed in the police force,[h] or any who receive remuneration at elections as counsel, agent, or in any other capacity,[i] or persons farming or collecting any public revenue,[j] are entitled to vote.

[175]

2. The qualifications of the elected.

2. Next, as to the qualifications of persons to be *elected* members of the house of commons. Some of these depend upon the law and custom of parliaments, declared by the

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[h] 10 Geo. IV. c. 44 & 45.

[i] 7 & 8 Geo. IV. c. 37, s. 1.

[j] 27 Geo. III. c. 26, s. 15. 51 Geo. III. c. 84.

house of commons;[k] others upon certain statutes. And from these it appears, 1. That they must not be aliens born,[l] minors,[m] outlaws, or persons convicted of bribery or treating.[n] 2. That they must not be any of the twelve judges,[o] because they sit in the lords' house; nor of the clergy,[p] by an express enactment; nor persons attainted of treason or felony,[q] for they are unfit to sit any where. 3. That sheriffs of counties, and mayors and bailiffs of boroughs, are not eligible in their respective jurisdictions, as being returning officers;[r] but that sheriffs of one county are eligible to be knights of another.[s] 4. That, in strictness, all members ought to have been inhabitants of the places for which they are chosen:[t] but this, having been long disregarded, was at length entirely repealed by statute 14 Geo. III. c. 58. 5. That no persons concerned in the management of any duties or taxes created since 1692, except the commissioners of the treasury,[u] nor any of the officers following,[v] (*viz.* commissioners of prizes, transports, sick and wounded, wine licences, navy, and victualling; [176] secretaries or receivers of prizes; comptrollers of the army accounts; agents for regiments; governors of plantations and their deputies; officers of Minorca or Gibraltar; officers of the excise and customs; clerks or deputies in the several offices of the treasury, exchequer, navy, victualling, admiralty, pay of the army or navy, secretaries of state, salt, stamps, appeals, wine licences, hackney coaches, hawkers and pedlars) nor any persons that hold any new office under the crown created since 1705,[w] are capable of being elected or sitting as members. 6. That no person who shall directly or indirectly, by himself or by any other to his use, hold any contract made with the commissioners of the treasury, navy, or victualling-office, or the master-general or board of ordnance, or any other person, for, or on account of the public service; or shall, in pursuance of any such contract, furnish any money to be remitted abroad, or any wares or merchandize to be used in the service of the public, shall be capable of being elected or sitting or voting in the house of commons, during the time that he shall hold such contract.[w] 7. That no person having a pension under the crown during pleasure, or for any term of years, is capable of being elected or sitting.[x] 8. That if any member accepts an office under the crown, except an officer in the army or navy accepting a new commission, his seat is void; but such member is capable of being re-elected.[y] 9. That all knights of the shire shall be actual knights, or such notable esquires and gentlemen as have estates sufficient to be knights, and by no means of the degree of yeomen.[z] This was attempted to be reduced to a still greater certainty, by ordaining, 10. That every knight of a shire shall have a clear estate of freehold or copyhold to the value of six hundred pounds *per annum*, and every citizen and burgess to the value of three hundred pounds: except the eldest sons of peers, and of persons qualified to be knights of shires, and except the members for the two universities:[a] which somewhat balanced the ascendant which the boroughs had gained over the counties, by obliging the trading interest to make choice of landed men: and of this qualification the member had to make oath, and give in the particulars in writing, at the time of his taking his seat.[b] But it having been found that this rule being inapplicable to the present times, was frequently evaded, the statutes enacting it have been very recently repealed by an act[c] of the present queen, and now a person shall be capable of being elected for any county in England or Ireland, if he shall be seised or entitled to a clear estate, whether real or personal, to the value of six hundred pounds per annum, and a person shall be capable of being elected for any borough in England or Ireland, if he shall be seised or entitled to a clear estate, whether real or personal, to the value of three hundred pounds per annum, (except members for the universities of Oxford, Cambridge, and Trinity College Dublin, the eldest sons of peers and of persons qualified to be knights of the shire, who need no qualification;) but of this qualification the member must make a solemn declaration at the time of his election if required, and also at the time of taking his seat, and must also deliver a statement of his qualification. Subject however to these [177] standing restrictions and disqualifications, every subject of the realm is eligible of common right: though there are instances, wherein persons in particular circumstances have forfeited that common right, and have been declared ineligible *for that parliament* by a vote of the house of commons,[c] or *for ever* by an act of the legislature.[d] But it was an unconstitutional prohibition, which was grounded on an ordinance of the house of *lords*,[e] and inserted in the *king's* writs, for the parliament holden at Coventry, 6 Hen. IV., that no apprentice or other man of the law should be elected a knight of the shire therein:[f] in return for which, our law books and historians[g] have branded this parliament with the name of *parliamentum indoctum*, or the lack-learning parliament; and sir Edward Coke observes with some spleen,[h] that there was never a good law made thereat.

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[k] 4 Inst. 47, 48.

[l] See pag. 157.

[m] *Ibid.*

[n] 49 Geo. III. c. 118.

[o] Com. Journ. 9 Nov. 1605.

[p] Com. Journ. 13 Oct. 1553. 8 Feb. 1620. 17 Jan. 1661. 41 Geo. III. c. 63.

[q] Com. Journ. 21 Jan. 1580. 4 Inst. 47.

[r] Bro. *Abr. t. parliament.* 7. Com. Journ. 25 June, 1604. 14 Apr. 1614. 22 Mar. 1620. 2. 4. 15 Jun. 17 Nov. 1685. Hal. of parl. 114.

[s] 4 Inst. 48. Whitelocke of parl. ch. 99, 100, 101.

[t] Stat. 1 Hen. V. c. 1. 23 Hen. VI. c. 15.

[u] Stat. 5 & 6 W. & M. c. 7.

[v] Stat. 11 & 12 W. III. c. 2. 12 & 13 W. III. c. 10. 6 Ann. c. 7. 15 Geo. II. c. 22.

[w] Stat. 6 Ann. c. 7.

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[w] 20 Geo. 3, c. 45.

[x] Stat. 6 Ann. c. 7. 1 Geo. I. c. 56.

[y] Stat. 6 Ann. c. 7.

[z] Stat. 23 Hen. VI. c. 15.

[a] Stat. 9 Ann. c. 5.

[b] Stat. 33 Geo. II. c. 20.

[c] 1 & 2 Vict. 48.

3. The method of proceeding in elections.

3. The third point, regarding elections, is the method of proceeding therein. This is also regulated by the law of parliament, and the several statutes referred to in the margin;[i] all which I shall blend together, and extract out of them a summary account of the method of proceeding to elections.

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[c] See pag. 158.

[d] Stat. 7. Geo. I. c. 28.

[e] 4 Inst. 10. 48 Pryn. Plea for lords, 379. 2 Whitelocke, 359. 368.

[f] Pryn. on 4 Inst. 13.

[g] Walsingh. *A. D.* 1405.

[h] 4 Inst. 48.

[i] 7 Hen. IV. c. 15. 8 Hen. VI. c. 7. 23 Hen. VI. c. 14. 1 W. & M. st. 1. c. 2. 2 W. & M. st. 1. c. 7. 5 & 6 W. & M. c. 20. 7 W. III. c. 4. 7 & 8 W. III. c. 7. & c. 25. 10 & 11 W. III. c. 7. 12 & 13 W. III. c. 10. 6 Ann. c. 23. 9 Ann. c. 5. 10 Ann. c. 19. & c. 33. 2 Geo. II. c. 24. 8 Geo. II. c. 30. 18 Geo. II. c. 18. 19 Geo. II. c. 28. 10 Geo. III. c. 16. 11 Geo. III. c. 42. 14 Geo. III. c. 15. 15 Geo. III. c. 36. 24 Geo. III. c. 36. 28 Geo. III. c. 52. 2 & 3 W. IV. c. 45. 6 & 7 W. IV. c. 102.

As soon as the parliament is summoned, the lord chancellor (or if a vacancy happens during the sitting of [178] parliament, the speaker by order of the house) sends his warrant to the clerk of the crown in chancery, who thereupon issues out writs to the sheriff of every county, for the election of all the members to serve for that county, and every city and borough therein. If a vacancy occurs during the recess, by death or promotion to the peerage, the speaker, upon receiving a certificate thereof, under the hands of two members, shall give notice of it in the London Gazette, and fourteen days after the insertion of such notice shall issue his warrant to the clerk of the crown to make out a new writ, and to prevent the inconvenience that may arise from the death of the speaker, or by his seat becoming vacant, or by his absence out of the realm, he appoints a certain number of members, not more than seven nor less than three, at the beginning of parliament to execute the power given him by the act.[j] Where also a member[k] has been declared a bankrupt during any recess and has not superseded the commission or fiat of bankruptcy within twelve months after it has issued, the speaker may cause a new writ to be issued for the election of another member. Within three, or in the cinque ports, within six days after the receipt of the writ, the sheriff is to send his precept, under his seal, to the proper returning officers of the cities and boroughs, commanding them to elect their members: and the said returning officers are to proceed to election within eight days from the receipt of the precept, giving four day's notice of the same;[l] and to return the persons chosen, together with the precept, to the sheriff.

Vacancies during recess.

But elections of knights of the shire must be proceeded to by the sheriffs themselves in person, and formerly at the next county court that happened after the delivery of the writ. The county court is a court held every month or oftener by the sheriff, intended to try little causes not exceeding the value of forty shillings, in what part of the county he pleases to appoint for that purpose: but for the election of knights of the shire it must be held at the most usual place. If the county court fell upon the day of delivering the writ, or within six days after, the sheriff might adjourn the court and election to some other convenient place, not longer than sixteen days, nor shorter than ten; but he could not alter the place without the consent of all the candidates, and in all such cases ten days' public notice was to be given of the time and place of the election.[m] But now by the 25 Geo. III. c. 84, s. 4, the sheriff is, within two days after the receipt of the writ, to cause proclamation to be made at the place where the election ought to be holden of a special county court to be there holden for the purpose of such election only, on any day (Sunday excepted) not later from the day of making such proclamation than the sixteenth, nor sooner than the eighth day, and he shall proceed in such election at such special county court in the same manner as if the election was to be held at a county court, or at an adjourned county court, according to the laws now in being. And by the first section of the same act every poll was to commence on the day upon which the same should be demanded, or upon the next day at farthest (unless Sunday, and then the day after), and should be duly and regularly proceeded in from day to day (Sundays excepted) until the same be finished, but so as that no poll should continue for more than sixteen days at most (Sunday excepted), and if such poll continued until the fifteenth day, then the same should be finally closed at or before the hour of three in the afternoon of the same day.

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[j] 24 Geo. III. c. 26.

[k] 52 Geo. III. c. 144. s. 2.

[l] In the borough of New Shoreham, in Sussex, wherein certain freeholders of the county are entitled to vote by statute 11 Geo. III. c. 55, the election must be within twelve days, with eight days' notice of the same. So in the borough of Cricklade, Wiltshire, where certain freeholders are entitled to vote by stat. 22 Geo. III. c. 31, the election must be within twelve days and not less than eight days, and notice of the same must be given forthwith. See 2 & 3 W. IV. c. 45, ss. 33 & 34.

[179]

Elections must be free.

And, as it is essential to the very being of parliament that elections should be absolutely free, therefore all undue influences upon the electors are illegal, and strongly prohibited. For Mr. Locke[n] ranks it among those breaches of trust in the executive magistrate, which according to his notions amount to a dissolution of the government, "if he employs the force, "treasure, and offices of the society to corrupt the represent-

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[m] 10 & 11 W. III. c. 7.

[n] on Gov. p. 2 §. 222.

" atives, or openly to pre-engage the electors, and prescribe " what manner of persons shall be chosen. For thus to re- " gulate candidates and electors, and new model the ways of " election, what is it, says he, but to cut up the government " by the roots, and poison the very fountain of public se- " curity?" As soon therefore as the time and place of election, either in counties or boroughs, are fixed, all soldiers quartered in the place are to remove, at least one day before the election, to the distance of two miles or more; and not to return till one day after the poll is ended. Riots likewise have been frequently determined to make an election void. And in such case, as we shall see, the poll may now be closed. By vote also of the house of commons, to whom alone belongs the power of determining contested elections, no lord of parliament, or lord lieutenant of a county, hath any right to interfere in the election of commoners; and, by statute, the lord warden of the cinque ports shall not recommend any members there. If any officer of the excise, customs, stamps, or certain other branches of the revenue, presume to intermeddle in elections, by persuading any voter or dissuading him, he forfeits 100*l*. and is disabled to hold any office.

The law as to bribery and corruption.

Thus are the electors of one branch of the legislature secured from any undue influence from either of the other two, and from all external violence and compulsion. But the greatest danger is that in which themselves co-operate, by the infamous practice of bribery and corruption. To prevent which it is enacted that no candidate shall, after the date (usually called the *teste*) of the writs, or after the vacancy, give any money or entertainment to his electors, or promise to give any, either to particular persons, or to the place [180] in general, in order to his being elected: on pain of being incapable to serve for that place in parliament. And if any money, gift, office, employment, or reward be given or promised to be given to any voter, at any time, in order to influence him to give or withhold his vote, as well he that takes as he that offers such bribe forfeits 500*l*., and is for ever disabled from voting and holding any office in any corporation; unless, before conviction, he will discover some other offender of the same kind, and then he is indemnified for his own offence.[o] And by the 49 Geo. III. c. 118, it is enacted that any person giving or causing to be given directly or indirectly, or agreeing to give any sum of money, gift or reward, to any person upon any agreement, that such person to whom such gift or promise shall be made, shall by himself, or any other person at his solicitation or command, procure, or endeavour to procure, the return of any person to serve in parliament, shall, if not returned himself to parliament for every such gift or promise, forfeit 1000*l.*, and the person so returned shall be disabled and incapacitated to serve in that parliament, and any person receiving or accepting any such sum shall forfeit 500*l.* But actions for these penalties, as well as those fixed by the former statutes, must be brought within two years after the offence is committed, (s. 2). The first instance that occurs, of election bribery, was so early as 13 Eliz. when one Thomas Longe (being a simple man and of small capacity to serve in parliament) acknowledged that he had given the returning officer and others of the borough for which he was chosen four pounds to be returned member, and was for that premium elected. But for this offence the borough was amerced, although in this, in the opinion of lord Mansfield, the house exceeded its power,[p] the member was removed, and the officer fined and imprisoned.[q] But, as this practice hath since taken much deeper and more universal root, it hath occasioned the making of these wholesome statutes; although the offence is undoubtedly punishable at common law;[r] to complete the efficacy of which, there is nothing wanting but resolution and integrity to put them in strict execution.

The mode of proceeding at the time of election.

Undue influence being thus (I wish the depravity of mankind would permit me to say, effectually) guarded against, the election is to be proceeded to on the day appointed: the sheriff or other returning officer first taking an oath against bribery, and for the due execution of his office. The candidates likewise, if required, must make a solemn declaration to their qualification;[s] and the electors in counties had formerly to swear as to theirs; and the electors both in counties and boroughs are also compellable to take the oath against bribery and corruption. And it might not be amiss, if the members elected were bound to take the latter oath, as well as the former; which in all probability would be much more effectual, than administering it only to the electors.

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[o] 2 Geo. II. c. 24. In like manner the Julian law *de ambitu* inflicted fines and infamy upon all who were guilty of corruption at elections; but, if the person guilty convicted another offender, he was restored to his credit again. *Ff.* 48. 14. 1.

[p] 3 Burr, 1336, and 2 Doug. 401.

[q] 4 Inst. 23. Hale of parl. 112. Com. Journ. 10 & 11 May 1571.

[r] *Rex* v. *Pitt*, 3 Burr. 1338.

Alterations as to the mode of proceeding at elections by the Reform Act and

But considerable further alterations are made as to the method of proceeding at elections by the Reform Act. Before that act the electors in counties had to take an oath as to their qualification. But by s. 58 of the Reform Act, in all future elections, no inquiry shall be permitted at the time of the election, except as to the identity of the voter, the continuance of his qualification, and whether he has voted before at the same election, and an oath as to these points, but no other as to his qualification may be administered, the register being taken as the sole criterion of the right to vote; but the oath against bribery may still be put to the electors as before the act; and by s. 59, persons excluded from the register by the barrister, may tender their votes at elections, and the tender is to be recorded, but no scrutiny shall hereafter take place at an election, (s. 58).

the 5 & 6 W. 4, c. 36.

By a subsequent act, 5 and 6 Wm. IV. c. 36, s. 6, it is enacted that no elector shall be required to take the oaths commonly called the oaths of allegiance, abjuration and supremacy, or the oaths required to be taken by any act of parliament in lieu thereof.

The sheriffs of the counties divided under the provision of the act, are to fix the time, and preside at the elections by themselves or deputies, (s. 61). The polling is to commence at nine in the forenoon of the next day but two fixed for the election, except it happen on a *Saturday*, or *Sunday*, and then it is to take place on the *Monday* following; at the principal place of election, and at each of the polling places; and such polling shall continue for two days only, for seven hours on the first day, and eight hours on the second day, (s. 62). By s. 63, counties are divided into districts for polling, and in each district a convenient place for taking the poll is to be appointed. At every contested election a reasonable number of booths for taking the poll shall be erected at the principal place of election, and at each of the other polling places; and no voter shall be allowed to poll except in the district where his property lies, (s. 64.) And by s. 65, provision is made for the safe custody of the poll-books, and the final declaration of the result of the poll.

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[s] 1 & 2 Vict. c. 48, s. 3.

The poll for cities and boroughs shall commence on the day fixed for the election, or on the day next following, or, at the latest, on the third day, except any of these days shall be a *Saturday* or *Sunday*, and then on the *Monday* following, the particular day to be fixed, by the returning officer; and such polling was to continue for two days only, and by the Reform Act, such two days being successive days, for seven hours on the first day of polling, and for eight on the second day of polling, (s. 67). At every contested election the returning officer was to erect different booths for different parishes of the city or borough, which booths might be situate in one place, or different places, and should be so divided, that not more than 600 persons should vote at one compartment in a booth; and each person to vote at the booth appointed for his parish or district, (s. 68).

But this has been altered by a subsequent act, so far as boroughs are concerned, it being enacted at all contested elections, that the polling for boroughs shall be taken in one day, (s. 2).[t] That the polling booths shall be so divided by the sheriff, that not more than 300 electors shall be allotted to poll in each booth, (s. 3). That this may be reduced to 100 electors for each booth at the requisition of any candidate, or his proposer or seconder, (s. 4). And by a later statute,[u] the number of polling places in counties may be increased by order in council, on a petition from the justices in quarter sessions, (s. 1), provided that as many polling booths shall be provided at each polling place as will allow one for every 450 electors.

and 6 & 7 W. 4, c. 102.

By the Reform Act, s. 70, the returning officer may close the poll before the expiration of the time fixed, in cases where the same might have been lawfully closed before the passing of this act; and in case of riot, the poll may be adjourned, to the following day.[v] By s. 71, the candidates, or persons proposing a candidate without his consent, shall be at the expense of booths and poll-clerks; but these expenses are limited by the act, (s. 71). Each booth shall be furnished with a true copy of the register of voters, (s. 72); and every deputy of a sheriff, or the returning officer, may administer the oaths, (s. 73.) By s. 76, any sheriff, or returning officer, who shall wilfully disobey the provisions of this act, may be sued in an action for debt for the penal sum of 500*l.* or any less sum which the jury may see fit to award.

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[t] 5 & 6 W. IV. c. 36.

[u] 6 & 7 W. IV. c. 102.

Proceedings after the election.

[181] The election being closed, the returning officer in boroughs returns his precept to the sheriff, with the persons elected by the majority: and the sheriff returns the whole, together with the writ for the county and the knights elected thereupon, to the clerk of the crown in chancery; before the day of meeting, if it be a new parliament, or within fourteen days after the election, if it be an occasional vacancy; and this under penalty of 500*l.* If the sheriff does not return such knights only as are duly elected, he forfeits, by the old statutes of Henry VI., 100*l.*; and the returning officer in boroughs for a like false return 40*l.*; and they are besides liable to an action, in which double damages shall be recovered, by the later statutes of king William: and any person bribing the returning officer shall also forfeit 300*l.* But the members returned by him are the sitting members, until the house of commons, upon petition, shall adjudge the return to be false and illegal. The form and manner of proceeding upon such petition are now regulated by statute 10 Geo. IV. c. 22, (repealing the previous statutes 10 Geo. III. c. 16, 11 Geo. III. c. 42, 14 Geo. III. c. 15, and 28 Geo. III. c. 52.) which directs the method of choosing by lot a select committee of eleven members, who are sworn well and truly to try the same, and a true judgment to give according to the evidence. And this abstract of the proceedings at elections of knights, citizens, and burgesses, concludes our inquiries into the laws and customs more peculiarly relative to the house of commons.

Petition against return.

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[v] This is by a subsequent statute, 5 & 6 W. IV. c. 36, s. 8, which particularly regulates the proceedings in case of a riot.

VI. The method of making laws.

VI. I proceed now, sixthly, to the method of making laws; which is much the same in both houses: and I shall touch it very briefly, beginning in the house of commons. But first I must premise, that for dispatch of business each house of parliament has its speaker. The speaker of the house of lords, whose office it is to preside there, and manage the formality of business, is the lord chancellor, or keeper of the king's great seal, or any other appointed by the king's commission: and, if none be so appointed, the house of lords (it is said) may elect. The speaker of the house of commons is chosen by the house; but must be approved by the king; and by a recent statute[w] his salary is fixed at 6000*l.* a-year, payable out of the consolidated fund, in lieu of all other fees and emoluments. And herein the usage of the two houses differs, that the speaker of the house of commons cannot give his opinion or argue any question in the house; but the speaker of the house of lords, if a lord of parliament, may. In each house the act of the majority binds the whole; and this majority is declared by votes [182] openly and publicly given: not as at Venice, and many other senatorial assemblies, privately or by ballot. This latter method may be serviceable, to prevent intrigues and unconstitutional combinations: but is impossible to be practiced with us; at least in the house of commons, where every member's conduct is subject to the future censure of his constituents, and therefore should be openly submitted to their inspection. When the numbers are equal in the house of commons, the speaker has a casting vote, but he never votes on other occasions. In the house of lords, the speaker, when a peer of parliament, votes as any other peer, but has no casting vote; and in case of an equality, the non-contents, or negative voices, have the same effect and operation as if they were in fact a majority,[x] the vote being lost.

The mode of bringing a bill into the house,

To bring a bill into the house, if the relief sought by it is of a private nature, it is first necessary to prefer a petition; which must be presented by a member, and usually sets forth the grievance desired to be remedied. This petition

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[w] 2 & 3 W. IV. c. 105.

[x] Lords' Journals, 25 June 1661. Mr. Christian's note.

(when founded on facts that may be in their nature disputed) is referred to a committee of members, who examine the matter alleged, and accordingly report it to the house; and then (or, otherwise, upon the mere petition) leave is given to bring in the bill. In public matters the bill is brought in upon motion made to the house, without any petition at all. Formerly, all bills were drawn in the form of petitions, which were entered upon the *parliament rolls*, with the king's answer thereunto subjoined; not in any settled form of words, but as the circumstances of the case required:[y] and at the end of each parliament the judges drew them into the form of a statute, which was entered on the *statute rolls*. In the reign of Henry V. to prevent mistakes and abuses, the statutes were drawn up by the judges before the end of the parliament; and in the reign of Henry VI. bills in the form of acts, according to the modern custom, were first introduced.

And of proceeding with it there.

The persons directed to bring in the bill, present it in a competent time to the house, drawn out on paper, with a multitude of blanks, or void spaces, where any thing occurs that is dubious, or necessary to be settled by the parliament itself; (such, especially, as the precise date of times, the nature and quantity of penalties, or of any sums of money to be raised) being indeed only the skeleton of the bill. In the house of lords, if the bill begins there, it is (when of a private nature) referred to two of the judges, to examine and report the state of the facts alleged, to see that all necessary [183] parties consent, and to settle all points of technical propriety. This is read a first time, and at a convenient distance a second time; and after each reading the speaker opens to the house the substance of the bill, and puts the question, whether it shall proceed any farther. The introduction of the bill may be originally opposed, as the bill itself may at either of the readings; and, if the opposition succeeds, the bill must be dropped for that session: as it must also, if opposed with success in any of the subsequent stages.

Reading a first and second time.

Its being committed,

After the second reading it is committed, that is, referred to a committee; which is either selected by the house in matters of small importance, or of a technical nature, or where evidence as to its subject matter is desirable, or else the house resolves itself into a committee of the whole house. A committee of the whole house is composed of every member; and, to form it, the speaker quits the chair, (another member being appointed chairman) and may sit and debate as a private member. In these committees the bill is debated clause by clause, amendments made, the blanks filled up, and sometimes the bill entirely new modelled. After it has gone through the committee the chairman reports it to the house with such amendments as the committee have made; and then the house reconsiders the whole bill again, and the question is repeatedly put upon every clause and amendment. When the house hath agreed or disagreed to the amendments of the committee, and sometimes added new amendments of its own, the bill is then ordered to be engrossed, or written in a strong gross hand, on one or more long rolls (or presses) of parchment sewed together. When this is finished, it is read a third time, and amendments are sometimes then made to it; and if a new clause be added, it is done by tacking a separate piece of parchment on the bill, which is called a ryder.[z] The speaker then again opens the contents; and, holding it up in his hands, puts the question, whether the bill shall pass. If this is agreed to, the title to it is then settled; which used to be a general one for all the acts passed in the session, till in the first year of [184] Henry VIII. distinct titles were introduced for each chapter. After this, one of the members is directed to carry it to the lords, and desire their concurrence; who, attended by several more, carries it to the bar of the house of peers, and there delivers it to their speaker, who comes down from his woolsack to receive it.

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[y] See, among numberless other instances, the *articuli cleri*, 9 Edw. II.

read a third time,

passed;

sent to the of lords.

It there passes through the same forms as in the other house, (except engrossing, which is already done) and, if rejected, no more notice is taken, but it passes *sub silentio*, to prevent unbecoming altercations. But if it is agreed to, the lords send a message by two masters in chancery (or upon matters of high dignity or importance, by two of the judges) that they have agreed to the same: and the bill remains with

Manner of proceeding in the house of lords.

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[z] Noy. 84.

the lords, if they have made no amendment to it. But if any amendments are made, such amendments are sent down with the bill to receive the concurrence of the commons. If the commons disagree to the amendments, a conference usually follows between members deputed from each house; who for the most part settle and adjust the difference: but, if both houses remain inflexible, the bill is dropped. If the commons agree to the amendments, the bill is sent back to the lords by one of the members, with a message to acquaint them therewith. The same forms are observed, *mutatis mutandis*, when the bill begins in the house of lords. But, when an act of grace or pardon is passed, it is first signed by his majesty, and then read once only in each of the houses, without any new engrossing or amendment.[a] And when both houses have done with any bill, it always is deposited in the house of peers, to wait the royal assent; except in the case of a bill of supply, which after receiving the concurrence of the lords is sent back to the house of commons.[b]

Royal assent.

The royal assent may be given two ways: 1. In person; when the king comes to the house of peers, in his crown and royal robes, and sending for the commons to the bar, the titles of all the bills that have passed both houses are read; and the king's answer is declared by the clerk of the parliament in Norman-French: a badge, it must be owned, (now the only one remaining) of conquest; and which one could wish to see fall into total oblivion, unless it be reserved as a solemn memento to remind us that our liberties are mortal, [185] having once been destroyed by a foreign force. If the king consents to a public bill, the clerk usually declares, "*le roy* "*le veut*, the king wills it so to be;" if to a private bill, "*soit fait comme il est desirè*, be it as it is desired." If the king refuses his assent, which he has never been advised to do since the reign of Wm. III.,[c] it is in the gentle language of "*le roy s'avisera*, the king will advise upon it." When a bill of supply is passed, it is carried up and presented to the king by the speaker of the house of commons:[d] and the royal assent is thus expressed, "*le roy re-*

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[a] D'ewes Journ. 20. 73. Com. Journ. 17 June 1747.

[b] Com. Journ 24 Jul. 1660.

[c] A. D. 1692.

[d] *Rot. Parl.* 9 *Hen. IV.* in Pryn. 4 Inst. 30, 31.

"*mercie ses loyal subjects, accepte lour benevolence, et aussi* "*le veut*, the king thanks his loyal subjects, accepts their "benevolence, and wills it so to be." In case of an act of grace, which originally proceeds from the crown, and has the royal assent in the first stage of it, the clerk of the parliament thus pronounces the gratitude of the subject; "*les* "*prelats, seigneurs, et commons, en ce present parliament* "*assemblees, au nom de touts vous autres subjects, remercient* "*tres humblement votre majestie, et prient a Dieu vous don-* "*ner en sante bone vie et longue;* the prelates, lords, and "commons, in this present parliament assembled, in the name "of all your other subjects, most humbly thank your majesty, "and pray to God to grant you in health and wealth long to "live."[e] 2. By the statute 33 Hen. VIII. c. 21, the king may give his assent by letters patent under his great seal, signed with his hand, and notified in his absence to both houses assembled together in the high house. And, when the bill has received the royal assent in either of these ways, it is then, and not before, a statute or act of parliament.

and the bill then becomes an act of parliament,

This statute or act is placed among the records of the kingdom; there needing no formal promulgation to give it the force of a law, as was necessary by the civil law with regard to the emperor's edicts: because every man in England is, in judgment of law, party to the making of an act of parliament, being present thereat by his representatives. However, a copy thereof is usually printed at the king's press for the information of the whole land, and sent to the magistrates and other public authorities. And formerly, before the invention of printing, it was used to be published by the sheriff of every county; the king's writ being sent to [186] him at the end of every session, together with a transcript of all the acts made at that session, commanding, him "*ut* "*statuta illa, et omnes articulos in eisdem contentos, in sin-* "*gulis locis ubi expedire viderit, publice proclamari, et fir-* "*miter teneri et observari faciat.*" And the usage was to proclaim them at his county court, and there to keep them, that whoever would might read or take copies thereof; which custom continued till the reign of Henry the seventh.[f]

and is placed among the records.

The power of an act of parliament.

An act of parliament, thus made, is the exercise of the highest authority that this kingdom acknowledges upon earth. It hath power to bind every subject in the land, and the dominions thereunto belonging; nay, even the king himself, if particularly named therein. And it cannot be altered, amended, dispensed with, suspended, or repealed, but in the same forms and by the same authority of parliament: for it is a maxim in law, that it requires the same strength to dissolve, as to create an obligation. It is true it was formerly held, that the king might in many cases dispense with penal statutes:[g] but now by statute 1 W. & M. st. 2, c. 2, it is declared that the suspending or dispensing with laws by legal authority, without consent of parliament, is illegal.

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[e] D'ewes journ. 35.

[f] 3 Inst. 41. 4 Inst. 26.

VII. The manner in which parliament may be adjourned, prorogued and dissolved.

VII. There remains only, in the seventh and last place, to add a word or two concerning the manner in which parliaments may be adjourned, prorogued, or dissolved.

Adjournment.

An adjournment is no more than a continuance of the session from one day to another, as the word itself signifies: and this is done by the authority of each house separately every day; and sometimes for a fortnight or a month together, as at Chritmas or Easter, or upon other particular occasions. But the adjournment of one house is no adjournment of the other.[h] It hath also been usual, when his majesty hath signified his pleasure that both or either of the houses should adjourn themselves to a certain day, to obey the king's pleasure so signified, and to adjourn accordingly.[i] Otherwise [187] besides the indecorum of a refusal, a prorogation would assuredly follow; which would often be very inconvenient to both public and private business. For prorogation puts an end to the session; and then such bills as are only begun and not perfected, must be resumed *de novo* (if at all) in a subsequent session: whereas, after an adjournment, all things continue in the same state as at the time of the adjournment made, and may be proceeded on without any fresh commencement.

Prorogation.

A prorogation is the continuance of the parliament from one session to another, as an adjournment is a continuation of the session from day to day. This is done by the royal authority, expressed either by the lord chancellor in his majesty's presence, or by commission from the crown, or frequently by proclamation. Both houses are necessarily prorogued at the same time; it not being a prorogation of the house of lords, or commons, but of the parliament. The session is never understood to be at an end until a prorogation: though, unless some act be passed or some judgment given in parliament, it is in truth no session at all.[j] And formerly the usage was, for the king to give the royal assent to all such bills as he approved, at the end of every session, and then to prorogue the parliament; though sometimes only for a day or two:[k] after which all business then depending in the houses was to be begun again. Which custom obtained so strongly, that it once became a question,[l] whether giving the royal assent to a single bill did not of course put an end to the session. And, though it was then resolved in the negative, yet the notion was so deeply rooted, that the statute 1 Car. I. c. 7, was passed to declare, that the king's assent to that and some other acts should not put an end to the session; and, even, so late as the reign of Charles II. we find a proviso frequently tacked to a bill,[m] that his majesty's assent thereto should not determine the session of parliament. But it now seems to be allowed, that a prorogation must be expressly made, in order to determine the session. And, if at the time of an actual rebellion, or imminent danger of invasion, the parliament shall be separated by adjournment or prorogation, [188] the king was empowered[n] to call them together by proclamation, with fourteen days' notice of the time appointed for their re-assembling. And now, as we have already seen,[o] the king may by proclamation at any time summon parliament at the expiration of fourteen days.[p]

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[g] Finch. L. 81. 234. Bacon. Elem. c. 19.

[h] 4 Inst. 28.

[i] Com. Journ. *passim: e. g.* 11 Jun. 1572. 5 Apr. 1604. 4 Jun. 14. Nov. 18 Dec. 1621. 11 Jul. 1625. 13 Sept. 1660. 25 Jul. 1667. 4 Aug. 1685. 24 Feb. 1691. 21 Jun. 1712. 16 Apr. 1717. 3 Feb. 1741. 10 Dec. 1745. 21 May 1768.

Dissolution. 1. by the king's will.

A dissolution is the civil death of the parliament; and this may be effected three ways: 1. By the king's will, expressed either in person or by representation. For, as the king has the sole right of convening the parliament, so also it is a branch of the royal prerogative, that he may (whenever he pleases) prorogue the parliament for a time, or put a final period to its existence. If nothing had a right to prorogue or dissolve a parliament but itself, it might happen to become perpetual. And this would be extremely dangerous, if at any time it should attempt to encroach upon the executive power: as was fatally experienced by the unfortunate king Charles the first; who, having unadvisedly passed an act to continue the parliament then in being till such time as it should please to dissolve itself, at last fell a sacrifice to that inordinate power, which he himself had consented to give them. It is therefore extremely necessary that the crown should be empowered to regulate the duration of these assemblies, under the limitations which the English constitution has prescribed: so that, on the one hand, they may frequently and regularly come together, for the dispatch of business, and redress of grievances; and may not, on the other, even with the consent of the crown, be continued to an inconvenient or unconstitutional length.

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[j] 4 Inst. 28. Hale of Parl. 38. Hut. 61.

[k] Com. Journ. 21 Oct. 1553.

[l] *Ibid.* 21 Nov. 1554.

[m] Stat. 12 Car. II. c. 1. 22 & 23 Car. II. c. 1.

[n] Stat. 30 Geo. II. c. 25.

[o] See *ante*, p. 144.

[p] 37 Geo. III. c. 127, and 39 & 40 Geo. III. c. 14.

2. by the demise of the crown.

2. A parliament may be dissolved by the demise of the crown. This dissolution formerly happened immediately upon the death of the reigning sovereign: for he being considered in law as the head of the parliament, (*caput, principium, et finis*) that failing, the whole body was held to be extinct. But the calling a new parliament immediately on the inauguration of the successor being found inconvenient, and dangers being apprehended from having no parliament in being in case of a disputed succession, it was enacted by the statutes 7 & 8 W. III. c. 15, and 6 Ann. [189] c. 7, that the parliament in being shall continue for six months after the death of any king or queen, unless sooner prorogued or dissolved by the successor: and by the statute of Anne it was enacted that, if the parliament were, at the time of the king's death, separated by adjournment or prorogation, it should notwithstanding assemble immediately: and that, if no parliament was then in being, the members of the last parliament should assemble, and be again a

parliament. But this has been repealed, and it is enacted, that in case of the demise of the crown, on or after the day appointed by writs of summons previously issued for assembling a new parliament, and before it shall actually have met, such new parliament shall immediately convene and sit for six months, unless sooner prorogued or dissolved by the successor.[q]

3 by length of time.

3. Lastly, a parliament may be dissolved or expire by length of time. For if either the legislative body were perpetual; or might last for the life of the prince who convened them, as formerly; and were so to be supplied, by occasionally filling the vacancies with new representatives; in these cases, if it were once corrupted, the evil would be past all remedy: but when different bodies succeed each other, if the people see cause to disapprove of the present, they may rectify its faults in the next. A legislative assembly also, which is sure to be separated again, (whereby its members will themselves become private men, and subject to the full extent of the laws which they have enacted for others) will think themselves bound, in interest as well as duty, to make only such laws as are good. The utmost extent of time that the same parliament was allowed to sit, by the statute 6 W. & M. c. 2, was *three* years; after the expiration of which, reckoning from the return of the first summons, the parliament was to have no longer continuance. But by the statute 1 Geo. I. st. 2, c. 38, (in order, professedly, to prevent the great and continued expences of frequent elections, and the violent heats and animosities consequent thereupon, and for the peace and security of the government then just recovering from the late rebellion) this term was prolonged to *seven* years: and, what alone is an instance of the vast authority of parliament, the very same house, that was chosen for three years, enacted its own continuance for seven. So that, as our constitution now stands, the parliament must expire, or die a natural death, at the end of every seventh year; if not sooner dissolved by the royal prerogative.

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[q] 37 Geo. III. c. 127.

CHAPTER THE THIRD.

OF THE KING AND HIS TITLE.

[190]

The supreme executive power is vested in the king or queen.

THE supreme executive power of these kingdoms is vested by our laws in a single person, the king or queen: for it matters not to which sex the crown descends; but the person entitled to it, whether male or female, is immediately invested with all the ensigns, rights, and prerogatives of sovereign power; as is declared by statute 1 Mar. st. 3, c. 1.

In discoursing of the royal rights and authority, I shall consider the king under six distinct views: 1. With regard to his title. 2. His royal family. 3. His councils. 4. His duties. 5. His prerogative. 6. His revenue. And first, with regard to his title.

As to the king's title.

The executive power of the English nation being vested in a single person, by the general consent of the people, the evidence of which general consent is long and immemorial usage, it became necessary to the freedom and peace of the state, that a rule should be laid down, uniform, universal, and permanent; in order to mark out with precision, *who* is that single person, to whom are committed (in subservience to the law of the land) the care and protection of the community; and to whom, in return, the duty and allegiance of every individual are due. It is of the highest importance to the public tranquillity, and to the consciences of private men, that this rule should be clear [191] and indisputable: and our constitution has not left us in the dark upon this material occasion. It will therefore be the endeavour of this chapter to trace out the constitutional doctrine of the royal succession, with that freedom and regard to truth, yet mixed with that reverence and respect, which the principles of liberty and the dignity of the subject require.

The crown is hereditary, but the hereditary right may be changed or limited by parliament.

The grand fundamental maxim upon which the *jus coronæ*, or right of succession to the throne of these kingdoms, depends, I take to be this: "that the crown is, by "common law and constitutional custom, hereditary; and "this in a manner peculiar to itself: but that the right of "inheritance may from time to time be changed or limited "by act of parliament; under which limitations the crown "still continues hereditary." And this proposition it will be the business of this chapter to prove, in all its branches; first, that the crown is hereditary; secondly, that it is hereditary in a manner peculiar to itself; thirdly, that this inheritance is subject to limitation by parliament; lastly, that when it is so limited, it is hereditary in the new proprietor.

1. It is hereditary.

1. First, it is in general *hereditary*, or descendible to the next heir, on the death or demise of the last proprietor. All regal governments must be either hereditary or elective: and, as I believe there is no instance wherein the crown of England has ever been asserted to be elective, except by the regicides at the infamous and unparalleled trial of king Charles I., it must of consequence be hereditary. Yet while I assert an hereditary, I by no means intend a *jure divino*, title to the throne. Such a title may be allowed to have subsisted under the theocratic establishments of the children of Israel in Palestine: but it never yet subsisted in any other country; save only so far as kingdoms, like other human fabrics, are subject to the general and ordinary dispensations of providence. Nor indeed have a *jure divino* and an *hereditary* right any necessary connexion with each other; as some have very weakly imagined. The titles of David and Jehu were equally *jure divino*, as those of either [192] Solomon or Ahab; and yet David slew the sons of his predecessor, and Jehu his predecessor himself. And when our kings have the same warrant as they had, whether it be to sit upon the throne of their fathers, or to destroy the

house of the preceding sovereign, they will then, and not before, possess the crown of England by a right like theirs, *immediately* derived from heaven. The hereditary right which the laws of England acknowledge, owes its origin to the founders of our constitution, and to them only. It has no relation to, nor depends upon, the civil laws of the Jews, the Greeks, the Romans, or any other nation upon earth: the municipal laws of one society having no connexion with, or influence upon, the fundamental polity of another. The founders of our English monarchy might perhaps, if they had thought proper, have made it an elective monarchy: but they rather chose, and upon good reason, to establish originally a succession by inheritance. This has been acquiesced in by general consent; and ripened by degrees into common law: the very same title that every private man has to his own estate. Lands are not naturally descendible any more than thrones: but the law has thought proper, for the benefit and peace of the public, to establish hereditary succession in the one as well as the other.

Advantages and disadvantages of an elective monarchy.

It must be owned, an elective monarchy seems to be the most obvious, and best suited of any to the rational principles of government, and the freedom of human nature: and accordingly we find from history that, in the infancy and first rudiments of almost every state, the leader, chief magistrate, or prince, hath usually been elective. And, if the individuals who compose that state could always continue true to first principles, uninfluenced by passion or prejudice, unassailed by corruption, and unawed by violence, elective succession were as much to be desired in a kingdom, as in other inferior communities. The best, the wisest, and the bravest man would then be sure of receiving that crown, which his endowments have merited; and the sense of an unbiassed majority would be dutifully acquiesced in by the [193] few who were of different opinions. But history and observation will inform us, that elections of every kind (in the present state of human nature) are too frequently brought about by influence, partiality, and artifice: and, even where the case is otherwise, these practices will be often suspected, and as constantly charged upon the successful, by a splenetic disappointed minority. This is an evil to which all societies are liable; as well those of a private and domestic kind, as the great community of the public, which regulates and includes the rest. But in the former there is this advantage; that such suspicions, if false, proceed no farther than jealousies and murmurs, which time will effectually suppress; and, if true, the injustice may be remedied by legal means, by an appeal to those tribunals to which every member of society has (by becoming such) virtually engaged to submit. Whereas, in the great and independent society, which every nation composes, there is no superior to resort to but the law of nature; no method to redress the infringements of that law, but the actual exertion of private force. As therefore between two nations, complaining of mutual injuries, the quarrel can only be decided by the law of arms; so in one and the same nation, when the fundamental principles of their common union are supposed to be invaded, and more especially when the appointment of their chief magistrate is alleged to be unduly made, the only tribunal to which the complainants can appeal is that of the God of battles, the only process by which the appeal can be carried on is that of a civil and intestine war. An hereditary succession to the crown is therefore now established, in this and most other countries, in order to prevent that periodical bloodshed and misery, which the history of ancient imperial Rome, and the more modern experience of Poland and Germany, may shew us are the consequences of elective kingdoms.

2. the particular mode of inheritance.

2. But, secondly, as to the particular mode of inheritance, it in general corresponds with the feodal path of descents, chalked out by the common law in the succession to landed estates; yet with one or two material exceptions. Like estates, the crown will descend lineally to the issue of the reigning monarch; as it did from king John to Richard II. [194] through a regular pedigree of six lineal generations. As in common descents, the preference of males to females, and the right of primogeniture among the males, are strictly adhered to. Thus Edward V. succeeded to the crown, in preference to Richard his younger brother and Elizabeth his elder sister. Like lands or tenements, the crown, on failure of the male line, descends to the issue female; ac-

cording to the ancient British custom remarked by Tacitus;[b] "*solent fœminarum ductu bellare, et sexum in imperiis non* "*discernere.*" Thus Mary I. succeeded to Edward VI.; and the line of Margaret queen of Scots, the daughter of Henry VII. succeeded on failure of the line of Henry VIII. his son. But, among the females, the crown descends by right of primogeniture to the eldest daughter only and her issue; and not, as in common inheritances, to all the daughters at once; the evident necessity of a sole succession to the throne having occasioned the royal law of descents to depart from the common law in this respect: and therefore queen Mary, on the death of her brother, succeeded to the crown alone, and not in partnership with her sister Elizabeth. Again: the doctrine of representation prevails in the descent of the crown, as it does in other inheritances; whereby the lineal descendants of any person deceased stand in the same place as their ancestor, if living, would have done. Thus Richard II. succeeded his grandfather Edward III. in right of his father the black prince; to the exclusion of all his uncles, his grandfather's younger children. Lastly, on failure of lineal descendants, the crown goes to the next collateral relations of the late king; provided they are lineally descended from the blood royal, that is, from that royal stock which originally acquired the crown. Thus Henry I. succeeded to William II.; John to Richard I.; and James I. to Elizabeth; being all derived from the conqueror, who was then the only regal stock. But herein there never was any objection (as was formerly the case of common descents) to the succession of a brother, an uncle, or other collateral relation, of the *half* blood; [195] that is, where the relationship proceeds not from the same *couple* of ancestors (which constitutes a kinsman of the *whole* blood) but from a *single* ancestor only; as when two persons are derived from the same father, and not from the same mother, or *vice versa:* provided only, that the one ancestor, from whom both are descended, be that from whose veins the blood royal is communicated to each. Thus Mary I. inherited to Edward VI.; and Elizabeth inherited to Mary; all children of the same father, king Henry VIII., but all by different mothers. But by a recent statute[c] the half blood is not now excluded in any common descent of lands.

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[b] *In vit. Agricolæ.*

3. the hereditary right is not indefeasible.

3. The doctrine of *hereditary* right does by no means imply an *indefeasible* right to the throne. No man will, I think, assert this, that has considered our laws, constitution, and history, without prejudice, and with any degree of attention. It is unquestionably in the breast of the supreme legislative authority of this kingdom, the king and both houses of parliament to defeat this hereditary right: and, by particular entails, limitations, and provisions, to exclude the immediate heir, and vest the inheritance in any one else. This is strictly consonant to our laws and constitution: as may be gathered from the expression so frequently used in our statute book, of "the king's majesty, his heirs, and successors." In which we may observe, that as the word, "heirs," necessarily implies an inheritance or hereditary right, generally subsisting in the royal person; so the word "successors," distinctly taken, must imply that this inheritance may sometimes be broken through; or, that there may be a successor, without being the heir, of the king. And this is so extremely reasonable, that without such a power, lodged somewhere, our polity would be very defective. For, let us barely suppose so melancholy a case, as that the heir apparent should be a lunatic, an idiot, or otherwise incapable of reigning: how miserable would the condition of the nation be, if he were also incapable of being set aside!—It is therefore necessary that this power should be lodged somewhere: and yet the inheritance, and regal dignity, would be very precarious indeed, if this power were *expressly* and *avowedly* lodged in the hands of the subject only, to be exerted whenever prejudice, caprice, or discontent should [196] happen to take lead. Consequently it can no where be so properly lodged as in the two houses of parliament, by and with the consent of the reigning king; who, it is not to be supposed, will agree to anything improperly prejudicial to the rights of his own descendants. And therefore in the king,

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[c] 3 & 4 W. IV. c. 106. s. 5. See its effects on the law stated in the *Principles of Real Property*, pp. 142, 145.

lords, and commons, in parliament assembled, our laws have expressly lodged it.

4. the crown retains its descendible quality however limited.

4. But, fourthly; however the crown may be limited or transferred, it still retains its descendible quality, and becomes hereditary in the wearer of it. And hence in our law the king is said never to die, in his political capacity; though, in common with other men, he is subject to mortality in his natural: because immediately upon the natural death of Henry, William, or Edward, the king survives in his successor. For the right of the crown vests, *eo instanti*, upon his heir; either the *hæres natus*, if the course of descent remains unimpeached, or the *hæres factus*, if the inheritance be under any particular settlement. So that there can be no *interregnum;* but as sir Matthew Hale[d] observes, the right of sovereignty is fully invested in the successor by the very descent of the crown. And therefore, however acquired, it becomes in him absolutely hereditary, unless by the rules of the limitation it is otherwise ordered and determined. In the same manner as landed estates, to continue our former comparison, are by the law hereditary, or descendible to the heirs of the owner; but still there exists a power, by which the property of those lands may be transferred to another person. If this transfer be made simply and absolutely, the lands will be hereditary in the new owner, and descend to his heir at law; but if the transfer be clogged with any limitations, conditions, or entails, the lands must descend in that channel, so limited and prescribed, and no other.

These four points have been held since the days of Egbert

[197]

In these four points consists, as I take it, the constitutional notion of hereditary right to the throne: which will be still further elucidated, and made clear beyond all dispute, from a short historical view of the succession to the crown of England, the doctrines of our ancient lawyers, and the several acts of parliament that have from time to time been made, to create, to declare, to confirm, to limit, or to bar, the hereditary title to the throne. And in the pursuit of this inquiry we shall find, that, from the days of Egbert, the first sole monarch of this kingdom, even to the present, the four cardinal maxims above-mentioned have ever been held the constitutional canons of successions. It is true, this succession, through fraud, or force, or sometimes through necessity, when in hostile times the crown descended on a minor or the like, has been very frequently suspended; but has generally at last returned back into the old hereditary channel, though sometimes a very considerable period has intervened. And, even in those instances where the succession has been violated, the crown has ever been looked upon as hereditary in the wearer of it. Of which the usurpers themselves were so sensible, that they for the most part endeavoured to vamp up some feeble show of a title by descent, in order to amuse the people, while they gained the possession of the kingdom. And, when possession was once gained, they considered it as the purchase or acquisition of a new estate of inheritance, and transmitted, or endeavoured to transmit it to their own posterity, by a kind of hereditary right of usurpation.

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[d] 1 Hist. P.C. 61.

In the year 800.

King Egbert about the year 800, found himself in possession of the throne of the west Saxons, by a long and undisturbed descent from his ancestors of above three hundred years. How his ancestors acquired their title, whether by force, by fraud, by contract, or by election, it matters not much to inquire; and is indeed a point of such high antiquity, as must render all inquiries at best but plausible guesses. His right must be supposed indisputably good, because we know no better. The other kingdoms of the heptarchy he acquired, some by consent, but most by a voluntary submission. And it is an established maxim in civil polity, and the law of nations, that when one country is united to another in such a manner, as that one keeps its government and states, and the other loses them; the latter entirely assimilates with or is melted down in the former, and [198] must adopt its laws and customs.[c] And in pursuance of this maxim there hath ever been, since the union of the heptarchy in king Egbert, a general acquiescence under the hereditary monarchy of the west Saxons, through all the united kingdoms.

From Egbert to Edmund Ironside the crown descended regularly.

From Egbert to the death of Edmund Ironside, a period of above two hundred years, the crown descended regularly, through a succession of fifteen princes, without any deviation or interruption: save only that the sons of king Ethelwolf succeeded to each other in the kingdom, without regard to the children of the elder branches, according to the rule of succession prescribed by their father, and confirmed by the wittena-gemote, in the heat of the Danish invasions; and also that king Edred, the uncle of Edwy, mounted the throne for about nine years, in the right of his nephew a minor, the times being very troublesome and dangerous. But this was with a view to preserve, and not to destroy, the succession; and accordingly Edwy succeeded him.

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[c] Puff. L. of N. and N. b. 8. c. 12. § 6.

Edmund Ironside divided the kingdom with Canute, who, on Edmund's death seized the whole. On the death of Hardiknute, the Saxon line was restored in the person of Edward the Confessor,

King Edmund Ironside was obliged, by the hostile irruption of the Danes, at first to divide his kingdom with Canute, king of Denmark; and Canute, after his death, seized the whole of it, Edmund's sons being driven into foreign countries. Here the succession was suspended by actual force, and a new family introduced upon the throne: in whom however this new acquired throne continued hereditary for three reigns; when, upon the death of Hardiknute, the ancient Saxon line was restored in the person of Edward the confessor.

He was not indeed the true heir to the crown,[f] being the younger brother of king Edmund Ironside, who had a son Edward, surnamed (from his exile) the outlaw, still living. But this son was then in Hungary; and, the English having just shaken off the Danish yoke, it was necessary that somebody on the spot should mount the throne; and the confessor [199] was the next of the royal line then in England. On his decease without issue, Harold II. usurped the throne; and almost at the same instant came on the Norman invasion: the right to the crown being all the time in Edgar, surnamed Atheling, (which signifies in the Saxon language *illustrious*, or of royal blood) who was the son of Edward the outlaw, and grandson of Edmund Ironside; or, as Matthew Paris[g] well expresses the sense of our old constitution, "*Edmundus* "*autem latusferreum, rex naturalis de stirpe regum, genuit*

on whose death Harold II. usurped the throne.

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[f] Mr. Justice Coleridge on this remarks, that Edward the Confessor, being the legitimate son of Ethelred the Unlucky, and having been superseded by his illegitimate brother Edmund, was the true heir to the crown, at least in preference to Edmund, or any child of his.

[g] *A. D.* 1066.

"*Edwardum; et Edwardus genuit Edgarum, cui de jure* "*debebatur regnum Anglorum.*"

William the Norman claimed the crown by virtue of a pretended grant from king Edward the Confessor; a grant which, if real, was in itself utterly invalid: because it was made, as Harold well observed in his reply to William's demand,[h] "*absque generali senatus, et populi conventu et* "*edicto;*" which also very plainly implies, that it then was generally understood that the king, with consent of the general council, might dispose of the crown and change the line of succession. William's title however was altogether as good as Harold's, he being a mere private subject, and an utter stranger to the royal blood. Edgar Atheling's undoubted right was overwhelmed by the violence of the times; though frequently asserted by the English nobility after the conquest, till such time as he died without issue: but all their attempts proved unsuccessful, and only served the more firmly to establish the crown in the family which had newly acquired it. **who was dispossessed by William the Conqueror,**

This conquest then by William of Normandy was, like that of Canute before, a forcible transfer of the crown of England into a new family; but, the crown being so transferred, all the inherent properties of the crown were with it transferred also. For the victory obtained at Hastings not being[i] a victory over the nation collectively, but only over the person of Harold, the only right that the conqueror could pretend to acquire thereby, was the right to possess the crown of England, not to alter the nature of the government. And therefore, as the English laws still remained in force, he must necessarily take the crown subject to those laws, and with all its inherent properties; the first and principal of which was its descendibility. Here then we must drop our race of Saxon kings, at least for a while, and derive our descents from William the Conqueror as from a new stock, who acquired by right of war (such as it is, yet still the *dernier resort* of kings) a strong and undisputed title to the inheritable crown of England. **by force,** [200]

Accordingly it descended from him to his sons William **and the throne de-**

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[h] William of Malmsb. *l.* 3.

[i] Hale, Hist. C. L. c. 5. Seld. Review of Tithes, c. 8.

scended to his sons William II. and Henry I.

II. and Henry I. Robert, it must be owned, his eldest son, was kept out of possession by the arts and violence of his brethren; who perhaps might proceed upon a notion, which prevailed for some time in the law of descents, (though never adopted as the rule of public successions[j]) that when the eldest son was already provided for, (as Robert was constituted duke of Normandy by his father's will) in such a case the next brother was entitled to enjoy the rest of their father's inheritance. But, as he died without issue, Henry at last had a good title to the throne, whatever he might have at first.

who was succeeded by Stephen, who was little better than a usurper.

Stephen of Blois,[k] who succeeded him, was indeed the grandson of the conqueror by Adelicia his daughter, and claimed the throne by a feeble kind of hereditary right: not as being the nearest of the male line, but as the nearest male of the blood royal, excepting his elder brother Theobald; who was earl of Blois, and therefore seemed to have waived, as he certainly never insisted on, so troublesome and precarious a claim. The real right was in the empress Matilda or Maud, the daughter of Henry I.; the rule of succession being (where women are admitted at all) that the daughter of a son shall be preferred to the son of a daughter. So that Stephen was little better than a mere usurper; and therefore he rather chose to rely on a title by election,[l] [201] while the empress Maud did not fail to assert her hereditary right by the sword: which dispute was attended with various success, and ended at last in the compromise made at Wallingford, that Stephen should keep the crown, but that Henry the son of Maud should succeed him; as he afterwards accordingly did.

Succeeded by Henry II.

Henry, the second of that name, was (next after his mother Matilda) the undoubted heir of William the Conqueror; but he had also another connexion in blood, which endeared him still farther to the English. He was lineally descended from Edmund Ironside, the last of the Saxon race of hereditary kings. For Edward the outlaw, the son of Edmund Ironside, had (besides Edgar Atheling, who died without issue) a daughter Margaret, who was married to Malcolm king of Scotland: and in her the Saxon hereditary right resided. By Malcolm she had several children, and among the rest Matilda the wife of Henry I., who by him had the empress Maud, the mother of Henry II. Upon which account the Saxon line is in our histories frequently said to have been restored in his person: though in reality that right subsisted in the *sons* of Malcolm by queen Margaret; king Henry's best title being as heir to the conqueror.

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[j] See Lord Lyttleton's Life of Henry II. Vol. I. p. 467.

[k] Stephen is generally called as above by Blackstone, Stephen of Blois, but incorrectly. His father was Earl of Blois, and then his brother. He was Earl of Boulogne, in right of his wife. Thus the shadow of title by which he claimed the throne really belonged to his elder brother, as noticed by Sir Richard Baker, in his *Chronicle—Life of Stephen.*

[l] "*Ego Stephanus Dei gratia assensu* "*cleri et populi in regem Anglorum* "*electus, &c.*" (*Cart. A. D.* 1136. Ric. de Hagustald. 314. Hearne *ad Guil. Neubr.* 711.)

Then Richard I. on whose death John seized the throne.

From Henry II. the crown descended to his eldest son Richard I., who dying childless, the right vested in his nephew Arthur, the son of Geoffrey his next brother: but John, the youngest son of king Henry, seized the throne; claiming, as appears from his charters, the crown by hereditary right;[m] that is to say, he was next of kin to the deceased king, being his surviving brother: whereas Arthur was removed one degree farther, being his brother's son, though by right of representation he stood in the place of his father Geoffrey. And however flimsy this title, and those of William Rufus and Stephen of Blois, may appear at this distance to us, after the law of descents hath now been settled for so many centuries, they were sufficient to puzzle the understandings of our brave, but unlettered, ancestors. Nor indeed can we wonder at the number of partizans, who [202] espoused the pretensions of king John in particular; since even in the reign of his father, king Henry II. it was a point undetermined,[n] whether, even in common inheritances, the child of an elder brother should succeed to the land in right of representation or the younger surviving brother in right of proximity of blood. Nor is it to this day decided in the collateral succession to the fiefs of the empire, whether the order of the stocks, or the proximity of degree shall take place.[o] However, on the death of Arthur and his sister

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[m] "—*Regni Angliæ; quod nobis* "*jure competit hæreditaris.*" Spelm. *Hist. R. Joh. apud* Wilkins, 354.

[n] Glanv. *l.* 7. *c.* 3.

[o] Mod Un. Hist. xxx. 512.

Next his son Henry III. who had a clear title to the crown, which descended for six generations in the regular line.

Eleanor without issue, a clear and indisputable title vested in Henry III. the son of John: and from him to Richard the second, a succession of six generations, the crown descended in the true hereditary line. Under one of which race of princes[p] we find it declared in parliament, "that the "law of the crown of England is, and always hath been, "that the children of the king of England, whether born "in England or elsewhere, ought to bear the inheritance "after the death of their ancestors. Which law our sove"reign lord the king, the prelates, earls, and barons, and "other great men, together with all the commons in par"liament assembled, do approve and affirm for ever."

On Richard II.'s resignation the right resulted to the issue of Edward III. his children were William, who died without issue; Lionel duke of Clarence and John of Gant,

Upon Richard the second's resignation of the crown, he having no children, the right resulted to the issue of his grandfather Edward III. That king had many children, besides his eldest, Edward the black prince of Wales, the father of Richard II.: but to avoid confusion I shall only mention three; William his second son, who died without issue; Lionel duke of Clarence, his third son; and John of Gant, duke of Lancaster, his fourth. By the rules of succession therefore the posterity of Lionel duke of Clarence were entitled to the throne, upon the resignation of king Richard; and had accordingly been declared by the king, many years before, the presumptive heirs of the crown: which declaration was also confirmed in parliament.[q] But Henry duke of Lancaster, the son of John of Gant, having [203] then a large army in the kingdom, the pretence of raising which was to recover his patrimony from the king, and to redress the grievances of the subject, it was impossible for any other title to be asserted with any safety; and he became king under the title of Henry IV. But, as sir Matthew Hale remarks,[r] though the people unjustly assisted Henry IV. in his usurpation of the crown, yet he was not admitted thereto, until he had declared that he claimed, not as a conqueror, (which he very much inclined to do)[s] but as a successor, descended by right line of the blood royal; as appears from the rolls of parliament in those times. And in order to this he set up a shew of two titles: the one upon

whose son became Henry IV.

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[p] Stat. 25 Edw. III. st. 2.

[q] Standford's Geneal. Hist. 246.

[r] Hist. C. L. c. 5.

[s] Seld. tit. Hon. 1. 3.

the pretence of being the first of the blood royal in the entire male line, whereas the duke of Clarence left only one daughter, Philippa; from which female branch, by a marriage with Edmond Mortimer earl of March, the house of York descended: the other, by reviving an exploded rumour, first propagated by John of Gant, that Edmond earl of Lancaster (to whom Henry's mother was heiress) was in reality the elder brother of king Edward I.; though his parents, on account of his personal deformity, had imposed him on the world for the younger: and therefore Henry would be entitled to the crown, either as successor to Richard II., in case the entire male line was allowed a preference to the female; or, even prior to that unfortunate prince, if the crown could descend through a female, while an entire male line was existing.

In whose reign the succession to the crown was new settled in the house of Lancaster.

However, as in Edward the third's time we find the parliament approving and affirming the law of the crown, as before stated, so in the reign of Henry IV. they actually exerted their right of new-settling the succession to the crown. And this was done by the statute 7 Hen. IV. c. 2, whereby it is enacted, "that the inheritance of the crown and realms "of England and France, and all other the king's do-"minions, shall be *set and remain*[t] in the person of our "sovereign lord the king, and in the heirs of his body "issuing;" and prince Henry is declared heir apparent to the crown, to hold to him and the heirs of his body issuing, [204] with remainder to lord Thomas, lord John, and lord Humphry, the king's sons, and the heirs of their bodies respectively: which is indeed nothing more than the law would have done before, provided Henry the fourth had been a rightful king. It however serves to shew that it was then generally understood, that the king and parliament had a right to new-model and regulate the succession to the crown; and we may also observe, with what caution and delicacy the parliament then avoided declaring any sentiment of Henry's original title. However sir Edward Coke more than once expressly declares,[u] that at the time of passing this act the right of the crown was in the descent from Philippa, daughter and heir of Lionel duke of Clarence.

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[t] *soit mys et demoerge.*

[u] 4 Inst. 37. 205.

Henry V. and VI. his son and grandson succeeded, but the house of York next prevailed in the person of Edward IV.

Nevertheless the crown descended regularly from Henry IV. to his son and grandson Henry V. and VI.; in the latter of whose reigns the house of York asserted their dormant title; and, after imbruing the kingdom in blood and confusion for seven years together, at last established it in the person of Edward IV. At his accession to the throne, after a breach of the succession that continued for three descents, and above threescore years, the distinction of a king *de jure* and a king *de facto* began to be first taken; in order to indemnify such as had submitted to the late establishment, and to provide for the peace of the kingdom by confirming all honours conferred and all acts done, by those who were now called the usurpers, not tending to the disherison of the rightful heir. In statute 1 Edw. IV. c. 1, the three Henrys are styled, "late kings of England successively in "dede, and not of ryght." And, in all the charters which I have met with of king Edward, wherever he has occasion to speak of any of the line of Lancaster, he calls them "*nuper de facto, et non de jure, reges Angliæ*."

who left two sons and a daughter, the eldest Edward V. deposed by Richard III.

Edward IV. left two sons and a daughter; the eldest of which sons, king Edward V. enjoyed the regal dignity for a very short time, and was then deposed by Richard his unnatural uncle, who immediately usurped the royal dignity; having previously insinuated to the populace a suspicion of bastardy in the children of Edward IV., to make a shew of [205] some hereditary title; after which he is generally believed to have murdered his two nephews; upon whose death the right of the crown devolved to their sister Elizabeth.

Who was deposed by Henry VII.

The tyrannical reign of king Richard III. gave occasion to Henry earl of Richmond to assert his title to the crown. A title the most remote and unaccountable that was ever set up, and which nothing could have given success to, but the universal detestation of the then usurper Richard. For, besides that he claimed under a descent from John of Gant, whose title was now exploded, the claim (such as it was) was through John Earl of Somerset, a bastard son, begotten by John of Gant upon Catherine Swinford. It is true, that, by an act of parliament 20 Ric. II., this son was, with others, legitimated and made inheritable to all lands, offices, and dignities, as if he had been born in wedlock: but still, with an express reservation of the crown, "*excepta dignitate regali*."[v]

Notwithstanding all this, immediately after the battle of Bosworth field, he assumed the regal dignity: the right of the crown then being, as sir Edward Coke expressly declares,[w] in Elizabeth, eldest daughter of Edward IV.: and his possession was established by parliament, holden the first year of his reign. In the act for which purpose, the parliament seems to have copied the caution of their predecessors in the reign of Henry IV.: and therefore (as lord Bacon the historian of this reign observes) carefully avoided any recognition of Henry VII's. right, which indeed was none at all; and the king would not have it by way of new law or ordinance, whereby a right might seem to be created and conferred upon him; and therefore a middle way was rather chosen, by way (as the noble historian expresses it) of *establishment*, and that under covert and indifferent words, "that the inheritance of the "crown should *rest*, *remain*, and *abide* in king Henry VII. "and the heirs of his body:" thereby providing for the future, and at the same time acknowledging his present possession; but not determining either way, whether that possession was *de jure* or *de facto* merely. However, he soon after married Elizabeth of York, the undoubted heiress of the conqueror, and thereby gained (as sir Edward Coke[x] declares) by much his best title to the crown. Whereupon the act made in his favour was so much disregarded, that it never was printed in our statute books.

Who married Elizabeth of York, the daughter of Edward IV.

Henry VIII. his son, and his three children succeeded.

Henry the eighth, the issue of this marriage, succeeded to the crown by clear indisputable hereditary right, and transmitted it to his three children in successive order. But in his reign we at several times find the parliament busy in regulating the succession to the kingdom. And, first, by statute 25 Hen. VIII. c. 12, which recites the mischiefs which have and may ensue by disputed titles, because no perfect and substantial provision hath been made by law concerning the succession; and then enacts that the crown shall be entailed to his majesty, and the sons or heirs male of his body; and in default of such sons to the lady Elizabeth (who is declared to be the king's eldest issue female, in exclusion of the lady Mary, on account of her supposed illegitimacy by the divorce of her mother queen Catherine) and to the lady Elizabeth's heirs of her body; and so on from issue female to issue female, and the heirs of their bodies, by course of inheritance according to their ages, *as the crown of England hath been accustomed and ought to go*, in case where there be heirs female of the same: and in default of issue female, then to the king's right heirs for ever. This single statute is an ample proof of all the four positions we at first set out with.

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[v] 4 Inst. 36.

[w] *Ibid*. 37.

[x] *Ibid*. 37.

But, upon the king's divorce from Ann Boleyn, this statute was, with regard to the settlement of the crown, repealed by statute 28 Hen. VIII. c. 7, wherein the lady Elizabeth is also, as well as the lady Mary, bastardized, and the crown settled on the king's children by queen Jane Seymour, and his future wives; and, in defect of such children, then with this remarkable remainder, to such persons as the king by letters patent, or last will and testa- [207] ment, should limit and appoint the same. A vast power; but, notwithstanding, as it was regularly vested in him by the supreme legislative authority, it was therefore indisputably valid. But this power was never carried into execution; for by statute 35 Hen. VIII. c. 1, the king's two daughters are legitimated again, and the crown is limited to prince Edward by name, after that to the lady Mary, and then to the lady Elizabeth, and the heirs of their respective bodies; which succession took effect accordingly, being indeed no other than the usual course of the law, with regard to the descent of the crown.

But lest there should remain any doubt in the minds of the people, through this jumble of acts for limiting the Mary. succession, by statute 1 Mar. p. 2, c. 1, queen Mary's hereditary right to the throne is acknowledged and recognized in these words: "the crown of these realms is most "lawfully, justly, and rightly *descended* and come to the "queen's highness that now is, being the very, true, and "undoubted heir and inheritrix thereof." And again, upon the queen's marriage with Philip of Spain, in the statute which settles the preliminaries of that match,[y] the hereditary right to the crown is thus asserted and declared: "as touching the right of the queen's inheritance in the "realm and dominions of England, the children, whether "male or female, shall succeed in them, according to the "known laws, statutes, and customs of the same." Which determination of the parliament, that the succession *shall* continue in the usual course, seems tacitly to imply a power of new-modelling and altering it, in case the legislature had thought proper.

Elizabeth.

On queen Elizabeth's accession, her right is recognized in still stronger terms than her sister's; the parliament acknowledging,[z] "that the queen's highness is, and in very "deed and of most mere right ought to be, by the laws of "God, and the laws and statutes of this realm, our most "lawful and rightful sovereign liege lady and queen; and "that her highness is rightly, lineally, and lawfully de- [208] "scended and come of the blood royal of this realm of "England; in and to whose princely person, and to the "heirs of her body lawfully to be begotten, after her, the "imperial crown and dignity of this realm doth belong." And in the same reign, by statute 13 Eliz. c. 1, we find the right of parliament to direct the succession of the crown asserted in the most explicit words. "If any person shall "hold, affirm, or maintain that the common laws of this "realm, not altered by parliament, ought not to direct the "right of the crown of England; or that the queen's "majesty, with and by the authority of parliament, is not "able to make laws and statutes of sufficient force and "validity, to limit and bind the crown of this realm, and "the descent, limitation, inheritance, and government "thereof:—such person, so holding, affirming, or maintain- "ing, shall, during the life of the queen, be guilty of high "treason; and after her decease shall be guilty of a mis- "demeanor, and forfeit his goods and chattels."

Then came James I.

On the death of queen Elizabeth, without issue, the line of Henry VIII. became extinct. It therefore became necessary to recur to the other issue of Henry VII. by Elizabeth of York his queen: whose eldest daughter

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[y] 1 Mar. p. 2. c. 2

[z] Stat. 1 Eliz. c. 3.

Margaret having married James IV. king of Scotland, king James the sixth of Scotland, and of England the first, was the lineal descendant from that alliance. So that in his person, as clearly as in Henry VIII. centred all the claims of different competitors, from the conquest downwards, he being indisputably the lineal heir of the conqueror. And, what is still more remarkable, in his person also centred the right of the Saxon monarchs, which had been suspended from the conquest till his accession. For, as was formerly observed, Margaret the sister of Edgar Atheling, the daughter of Edward the outlaw, and grand-daughter of king Edmund Ironside, was the person in whom the hereditary right of the Saxon kings, supposing it not abolished by the conquest, resided. She married Malcolm king of Scotland; and Henry II. by a descent from Matilda their daughter, is generally called the restorer of the [209] Saxon line. But it must be remembered, that Malcolm by his Saxon queen had sons as well as daughters; and that the royal family of Scotland from that time downwards were the offspring of Malcolm and Margaret. Of this royal family king James the first was the direct lineal heir, and therefore united in his person every possible claim by hereditary right to the English as well as Scottish throne, being the heir both of Egbert and William the Conqueror.

And it is no wonder that a prince of more learning than wisdom, who could deduce an hereditary title for more than eight hundred years, should easily be taught by the flatterers of the times to believe there was something divine in this right, and that the finger of Providence was visible in its preservation. Whereas, though a wise institution, it was clearly a human institution; and the right inherent in him no natural, but a positive, right. And in this and no other light was it taken by the English parliament; who by statute 1 Jac. I. c. 1, did "recognize and acknowledge, that "immediately upon the dissolution and decease of Elizabeth "late queen of England, the imperial crown thereof did by "inherent birthright, and lawful and undoubted succession, "descend and come to his most excellent majesty, as being "lineally, justly, and lawfully, next and sole heir of the "blood royal of this realm." Not a word here of any right immediately derived from heaven: which, if it existed any where, must be sought for among the *aborigines* of the island, the ancient Britons; among whose princes indeed some have gone to search it for him.[a]

But, wild and absurd as the doctrine of divine right most undoubtedly is, it is still more astonishing, that when so many human hereditary rights had centred in this king, his son and heir king Charles the first should be told by those [210] infamous judges, who pronounced his unparalleled sentence, **Charles I.** that he was an elective prince; elected by his people, and therefore accountable to them, in his own proper person, for his conduct. The confusion, instability, and madness, which followed the fatal catastrophe of that pious and unfortunate prince, will be a standing argument in favour of hereditary monarchy to all future ages; as they proved at last to the then deluded people: who, in order to recover that peace **The convention-parliament, 1660.** and happiness which for twenty years together they had lost, in a solemn parliamentary convention of the states restored the right heir of the crown. And in the proclamation for that purpose, which was drawn up and attended by both houses,[b] they declared, "that, according to their duty and "allegiance, they did heartily, joyfully, and unanimously "acknowledge and proclaim, that immediately upon the de"cease of our late sovereign lord king Charles, the imperial "crown of these realms did by inherent birthright and law"ful and undoubted succession descend and come to his "most excellent majesty Charles the second, as being li- **Charles II.** "neally, justly, and lawfully, next heir of the blood royal of "this realm: and thereunto they most humbly and faithfully "did submit and oblige themselves, their heirs, and poste"rity for ever."

Thus I think it clearly appears, from the highest authority this nation is acquainted with, that the crown of England hath been ever an hereditary crown; though subject to limitations by parliament. The remainder of this

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[a] Elizabeth of York, the mother of queen Margaret of Scotland, was heiress of the house of Mortimer. And Mr. Carte observes, that the house of Mortimer, in virtue of its descent from Gladys, only sister to Lewellin ap Jorwerth the great, had the true right to the principality of Wales. *Hist. Eng.* iii. 705.

[b] Com. Journ. 8 May 1660.

Instances where parliament has asserted the right of altering the succession.

chapter will consist principally of those instances, wherein the parliament has asserted or exercised this right of altering and limiting the succession; a right which, we have seen, was before exercised and asserted in the reigns of Henry IV. Henry VII. Henry VIII. queen Mary, and queen Elizabeth.

The bill of exclusion *tempore* Charles II.

The first instance, in point of time, is the famous bill of exclusion, which raised such a ferment in the latter end of the reign of king Charles the second. It is well known that the purport of this bill was to have set aside the king's [211] brother and presumptive heir, the duke of York, from the succession, on the score of his being a papist; that it passed the house of commons, but was rejected by the lords; the king having also declared beforehand, that he never would be brought to consent to it. And from this transaction we may collect two things: 1. That the crown was universally acknowledged to be hereditary; and the inheritance indefeasible unless by parliament: else it had been needless to prefer such a bill. 2. That the parliament had a power to have defeated the inheritance: else such a bill had been ineffectual. The commons acknowledged the hereditary right then subsisting; and the lords did not dispute the power, but merely the propriety, of an exclusion. However, as the bill took no effect, king James the second succeeded to the throne of his ancestors; and might have enjoyed it during the remainder of his life, but for his own infatuated conduct, which (with other concurring circumstances) brought on the revolution in 1688.

James II.

The true ground and principle, upon which that memorable event proceeded, was an entirely new case in politics, which had never before happened in our history; the abdication of the reigning monarch, and the vacancy of the throne thereupon. It was not a defeazance of the right of succession, and a new limitation of the crown, by the king and both houses of parliament: it was the act of the nation alone, upon a conviction that there was no king in being. For in a full assembly of the lords and commons, met in a convention upon the supposition of this vacancy, both houses[c] came to this resolution; "that king James the

The convention-parliament, 1688.

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[c] Com Journ. 7 Feb. 1688.

" second, having endeavoured to subvert the constitution of " the kingdom, by breaking the original contract between " king and people; and, by the advice of jesuits and other " wicked persons, having violated the fundamental laws; " and having withdrawn himself out of this kingdom; has " abdicated the government, and that the throne is thereby " vacant." Thus ended at once, by this sudden and unex- [212] pected vacancy of the throne, the old line of succession; which from the conquest had lasted above six hundred years, and from the union of the heptarchy in king Egbert almost nine hundred. The facts themselves thus appealed to, the king's endeavour to subvert the constitution by breaking the original contract, his violation of the fundamental laws, and his withdrawing himself out of the kingdom, were evident and notorious: and the consequences drawn from these facts (namely, that they amounted to an abdication of the government; which abdication did not affect only the person of the king himself, but also all his heirs, and rendered the throne absolutely and completely vacant) it belonged to our ancestors to determine. For, whenever a question arises between the society at large and any magistrate, vested with powers originally delegated by that society, it must be decided by the voice of the society itself: there is not upon earth any other tribunal to resort to. And that these consequences were fairly deduced from these facts, our ancestors have solemnly determined, in a full parliamentary convention representing the whole society. The reasons upon which they decided may be found at large in the parliamentary proceedings of the times; and may be matter of instructive amusement for us to contemplate, as a speculative point of history. But care must be taken not to carry this inquiry farther, than merely for instruction or amusement. The idea, that the consciences of posterity were concerned in the rectitude of their ancestors' decisions, gave birth to those dangerous political heresies, which so long distracted the state, but at length are all happily extinguished. I therefore rather choose to consider this great political measure upon the solid footing of authority, than to reason in its favour from its justice, moderation, and expedience: because that might imply a right of dissenting or revolting from it, in case we should think it to have been unjust, oppressive, or inexpedient. Whereas, our ancestors having most indisputably a competent jurisdiction to decide this great and important question, and having in fact decided [213] it, it is now become our duty at this distance of time to acquiesce in their determination; being born under that establishment which was built upon this foundation, and obliged by every tie, religious as well as civil, to maintain it.

But, while we rest this fundamental transaction, in point of authority, upon grounds the least liable to cavil, we are bound both in justice and gratitude to add, that it was conducted with a temper and moderation which naturally arose from its equity; that, however it might in some respects go beyond the letter of our ancient laws, (the reason of which will more fully appear hereafter)[d] it was agreeable to the spirit of our constitution, and the rights of human nature; and that though in other points (owing to the peculiar circumstances of things and persons) it was not altogether so perfect as might have been wished, yet from thence a new æra commenced, in which the bounds of prerogative and liberty have been better defined, the principles of government more thoroughly examined and understood, and the rights of the subject more explicitly guarded by legal provisions, than in any other period of the English history. In particular it is worthy observation that the convention, in this their judgment, avoided with great wisdom the wild extremes into which the visionary theories of some zealous republicans would have led them. They held that this misconduct of king James amounted to an *endeavour* to subvert the constitution; and not to an actual subversion, or total dissolution, of the government, according to the principles of Mr. Locke:[e] which would have reduced the society almost to a state of nature; would have levelled all distinctions of honour, rank, offices, and property; would have annihilated the sovereign power, and in consequence have repealed all positive laws; and would have left the people at liberty to have erected a new system of state upon a new foundation of polity. They therefore very prudently voted it to amount to no more than an abdication of the government, and a consequent vacancy of the throne; [214] whereby the government was allowed to subsist, though the executive magistrate was gone, and the kingly office to remain, though king James was no longer king.[f] And thus the constitution was kept entire; which upon every sound principle of government must otherwise have fallen to pieces, had so principal and constituent a part as the royal authority been abolished, or even suspended.

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[d] See chap. VII.

[e] on Gov. p. 2. c. 19.

This single postulatum, the vacancy of the throne, being once established, the rest that was then done followed almost of course. For, if the throne be at any time vacant, (which may happen by other means besides that of abdication; as if all the blood royal should fail, without any successor appointed by parliament;) if, I say, a vacancy by any means whatsoever should happen, the right of disposing of this vacancy seems naturally to result to the lords and commons, the trustees and representatives of the nation. For there are no other hands in which it can so properly be intrusted; and there is a necessity of its being intrusted somewhere, else the whole frame of government must be dissolved and perish. The lords and commons having therefore determined this main fundamental article, that there was a vacancy of the throne, they proceeded to fill up that vacancy in such manner as they judged the most proper. And this was done by their declaration of 12 February 1688,[g] in the following manner: "that William and "Mary, prince and princess of Orange, be, and be declared "king and queen, to hold the crown and royal dignity "during their lives, and the life of the survivor of them; "and that the sole and full exercise of the regal power be "only in, and executed by, the said prince of Orange, in "the names of the said prince and princess, during their "joint lives: and after their deceases the said crown and "royal dignity to be to the heirs of the body of the said "princess; and for default of such issue to the princess "Anne of Denmark and the heirs of her body; and for "default of such issue to the heirs of the body of the said "prince of Orange."

Act of settlement, 1688, whereby William and Mary are declared king and queen.

[215]

Perhaps, upon the principles before established, the con-

Principles of the act of settlement.

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[f] Law of Forfeit. 118, 119.

[g] Com. Journ. 12 Feb. 1688.

vention might (if they pleased) have vested the regal dignity in a family entirely new, and strangers to the royal blood: but they were too well acquainted with the benefits of hereditary succession, and the influence which it has by custom over the minds of the people, to depart any farther from the ancient line than temporary necessity and self-preservation required. They therefore settled the crown, first on king William and queen Mary, king James's eldest daughter, for their joint lives: then on the survivor of them; and then on the issue of queen Mary: upon failure of such issue, it was limited to the princess Anne, king James's second daughter, and her issue; and lastly, on failure of that to the issue of king William, who was the grandson of Charles the first, and nephew as well as son-in-law of king James the second, being the son of Mary his eldest sister. This settlement included all the protestant posterity of king Charles I., except such other issue as king James might at any time have, which was totally omitted through fear of a popish succession. And this order of succession took effect accordingly.

William, Mary, and Anne, took by purchase.

These three princes therefore, king William, queen Mary, and queen Anne, did not take the crown by hereditary right or *descent*, but by way of donation or *purchase*, as the lawyers call it; by which they mean any method of acquiring an estate otherwise than by descent. The new settlement did not merely consist in excluding king James, and the person pretended to be prince of Wales, and then suffering the crown to descend in the old hereditary channel: for the usual course of descent was in some instances broken through; and yet the convention still kept it in their eye, and paid a great, though not total, regard to it. Let us see how the succession would have stood, if no abdication had happened, and king James had left no other issue than his two daughters queen Mary and queen Anne. It would have stood thus: queen Mary and her issue; queen Anne and her issue; king William and his issue. But we may re- [216] member, that queen Mary was only nominally queen, jointly with her husband king William, who alone had the regal power; and king William was personally preferred to queen Anne, though his issue was postponed to hers. Clearly therefore these princes were successively in possession of the crown by a title different from the usual course of descent.

It was towards the end of king William's reign, when all hopes of any surviving issue from any of these princes died with the duke of Glocester, that the king and parliament thought it necessary again to exert their power of limiting and appointing the succession, in order to prevent another vacancy of the throne; which must have ensued upon their deaths, as no farther provision was made at the Revolution, than for the issue of queen Mary, queen Anne, and king William. The parliament had previously by the statute of 1 W. & M. st. 2, c. 2, enacted, that every person who should be reconciled to, or hold communion with, the see of Rome, should profess the popish religion, or should marry a papist, should be excluded and for ever incapable to inherit, possess, or enjoy, the crown; and that in such case the people should be absolved from their allegiance, and the crown should descend to such persons, being protestants, as would have inherited the same, in case the person so reconciled, holding communion, professing, or marrying, were naturally dead. To act therefore consistently with themselves, and at the same time pay as much regard to the old hereditary line as their former resolutions would admit, they turned their eyes on the princess Sophia, electress and duchess dowager of Hanover, the most accomplished princess of her age.[h] For, upon the impending extinction of the protestant posterity of Charles the first, the old law of regal descent directed them to recur to the descendants of James the first; and the princess Sophia, being the youngest daughter of Elizabeth queen of Bohemia, who was the daughter of James the first, was the nearest of the ancient blood royal, who was not incapacitated by professing the popish religion. On her therefore, and the heirs of her body, being protestants, the remainder of the crown, expectant on the death of king William and queen Anne

Act of exclusion. 1 W. & M. st. 2, c. 2.

[217]

12&13 W. III. c. 2. limits the crown in the descendants of the princess Sophia.

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[h] Sanford in his Genealogical History, published *A. D.* 1677. speaking (page 535) of the princesses Elizabeth, Louisa and Sophia, daughters of the queen of Bohemia, says, the first was reputed the most learned, the second the greatest artist, and the last one of the most accomplished ladies in Europe.

without issue, was settled by statute 12 & 13 Wm. III. c. 2. And at the same time it was enacted, that whosoever should hereafter come to the possession of the crown should join in the communion of the church of England as by law established.

This is the last limitation of the crown that has been made by parliament: and these several actual limitations, from the time of Henry IV. to the present, do clearly prove the power of the king and parliament to new-model or alter the succession. And indeed it is now again made highly penal to dispute it: for by the statute 6 Ann. c. 7. it is enacted, that if any person maliciously, advisedly, and directly, shall maintain by writing or printing, that the kings of this realm with the authority of parliament are not able to make laws to bind the crown and the descent thereof, he shall be guilty of high treason; or if he maintains the same by only preaching, teaching, or advised speaking, he shall incur the penalties of a *præmunire*.

Who succeeded to the throne in the persons of George I. II. III. IV. William IV. and her present majesty.

The princess Sophia dying before queen Anne, the inheritance thus limited descended on her son and heir king George the first; and, having on the death of the queen taken effect in his person, from him it descended to his late majesty king George the second; from him to his grandson and heir, king George the third; and from him to his sons George the fourth, and William the Fourth, who dying without issue, the inheritance descended to the grand-daughter of George the third, our present gracious sovereign.

The common stock is now in the princess Sophia.

Hence it is easy to collect, that the title to the crown is at present hereditary, though not quite so absolutely hereditary as formerly: and the common stock or ancestor, from whom the descent must be derived, is also different. Formerly the common stock was king Egbert; then William the conqueror; afterwards in James the first's time the two common stocks united, and so continued till the vacancy of the throne in 1688: now it is in the princess Sophia, in whom
[218] the inheritance was vested by the new king and parliament. Formerly the descent was absolute, and the crown went to the next heir without any restriction: but now, upon the new settlement, the inheritance is conditional; being limited to such heirs only, of the body of the princess Sophia, as are

protestant members of the church of England, and are married to none but protestants.

The true constitutional right of succession.

And in this due medium consists, I apprehend, the true constitutional notion of the right of succession to the imperial crown of these kingdoms. The extremes, between which it steers, are each of them equally destructive of those ends for which societies were formed and are kept on foot. Where the magistrate, upon every succession, is elected by the people, and may by the express provision of the laws be deposed (if not punished) by his subjects, this may sound like the perfection of liberty, and look well enough when delineated on paper: but in practice will be ever productive of tumult, contention, and anarchy. And, on the other hand, divine indefeasible hereditary right, when coupled with the doctrine of unlimited passive obedience, is surely of all constitutions the most thoroughly slavish and dreadful. But when such an hereditary right, as our laws have created and vested in the royal stock, is closely interwoven with those liberties, which, we have seen in a former chapter, are equally the inheritance of the subject; this union will form a constitution, in theory the most beautiful of any, in practice the most approved, and, I trust, in duration the most permanent. It was the duty of an expounder of our laws to lay this constitution before the student in its true and genuine light: it is the duty of every good Englishman to understand, to revere, to defend it.

CHAPTER THE FOURTH.

OF THE KING'S ROYAL FAMILY.

[219] The queen

THE first and most considerable branch of the king's royal family, regarded by the laws of England, is the queen.

is either regent, consort, or dowager.

The queen of England is either queen *regent*, queen *consort*, or queen *dowager*. The queen *regent, regnant*, or *sovereign*, is she who holds the crown in her own right; as the first (and perhaps the second) queen Mary, queen Elizabeth, queen Anne, and our present gracious sovereign; and such a one has the same powers, prerogatives, rights, dignities, and duties, as if she had been a king. This was observed in the entrance of the last chapter, and is expressly declared by statute 1 Mar. I. st. 3, c. 1. But the queen *consort* is the wife of the reigning king; and she, by virtue of her marriage, is participant of divers prerogatives above other women.[a]

[220] The queen consort.

And, first, she is a public person, exempt and distinct from the king; and not, like other married women, so closely connected as to have lost all legal or separate existence so long as the marriage continues. For the queen is of ability to purchase lands, to convey them, or devise them,[b] to make leases, to grant copyholds, and do other acts of ownership, without the concurrence and during the lifetime of her lord; which no other married woman can do:[c] a privilege as old as the Saxon æra.[d] She is also capable of taking a grant directly from the king, which no other wife is from her husband; although she may do this indirectly through the medium of the Statute of Uses:[e] and in this particular she agrees with the *Augusta*, or *piissima regina conjux divi imperatoris* of the Roman laws: who, according to Justinian,[f] was equally capable of making a grant to, and receiving one from, the emperor. The queen of England hath separate courts and officers distinct from the king's not only in matters of ceremony, but even of law; and her attorney and solicitor-general are entitled to a place within the bar of his majesty's courts, together with the king's counsel.[g] She may likewise sue and be sued alone, without joining her husband. She may also have a separate property in goods as well as lands, and has a right to dispose of them by will. In short, she is in all legal proceedings looked upon as a feme sole, and not as a feme covert; as a single, not as a married woman.[h] For which the reason given by Sir Edward Coke is this: because the wisdom of the common law would not have the king (whose continual care and study is for the public, and *circa ardua regni*) to be troubled and disquieted on account of his wife's domestic affairs; and therefore it vests in the queen a power of transacting her own concerns, without the intervention of the king, as if she was an unmarried woman.

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[a] Finch. L. 86.

[b] 39 & 40 Geo. III. c. 88. s. 9.

[c] 4 Rep. 23.

[d] Seld. *Jan. Angl.* 1. 42.

Her exemptions and prerogatives.

The queen hath also many exemptions, and minute prerogatives. For instance: she pays no toll;[i] nor is she liable to any amercement in any court.[j] But in general, [221] unless where the law has expressly declared her exempted, she is upon the same footing with other subjects; being to all intents and purposes the king's subject, and not his equal: in like manner as, in the imperial law, "*Augusta* "*legibus soluta non est.*"[k]

Her pecuniary advantages.

The queen hath also some pecuniary advantages, which form her a distinct revenue: as, in the first place, she is entitled to an ancient perquisite called queen-gold, or *aurum*

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[e] 27 Hen. VIII. c. 27.

[f] *Cod.* 5. 16. 26.

[g] Seld. tit. Hon. 1. 6. 7.

[h] Finch. L. 86. Co. Litt. 133.

[i] Co. Litt. 133.

[j] Finch. L. 185.

[k] *Ff.* 1. 3. 31.

reginæ; which is a royal revenue, belonging to every queen consort during her marriage with the king, and due from every person who hath made a voluntary offering or fine to the king, amounting to ten marks or upwards, for and in consideration of any privileges, grants, licences, pardons, or other matters of royal favour conferred upon him by the king: and it is due in the proportion of one-tenth part more, over and above the entire offering or fine made to the king; and becomes an actual debt of record to the queen's majesty by the mere recording of the fine.[l] As, if an hundred marks of silver be given to the king for liberty to take in mortmain, or to have a fair, market, park, chase, or free-warren: there the queen is entitled to ten marks in silver, or (what was formerly an equivalent denomination) to one mark in gold, by the name of queen-gold, or *aurum reginæ.*[m] But no such payment is due for any aids or subsidies granted to the king in parliament or convocation; nor for fines imposed by courts on offenders, against their will; nor for voluntary presents to the king, without any consideration moving from him to the subject; nor for any sale or contract whereby the present revenues or possessions of the crown are granted away or diminished.[n]

The original revenue of the queen consort.

[222]

The original revenue of our ancient queens, before and soon after the conquest, seems to have consisted in certain reservations or rents out of the demesne lands of the crown, which were expressly appropriated to her majesty, distinct from the king. It is frequent in domesday book, after specifying the rent due to the crown, to add likewise the quantity of gold or other renders reserved to the queen.[o] These were frequently appropriated to particular purposes; to buy wool for her majesty's use,[p] to purchase oil for her lamps[q], or to furnish her attire from head to foot,[r] which was fre-

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[l] Pryn. *Aur. Reg.* 2.

[m] 12 Rep. 21. 4 Inst. 358.

[n] *Ibid.* Pryn. 6. Madox. *Hist. Exch.* 242.

[o] *Bedefordscire Maner. Lestone redd. per annum xxii lib. &c.: ad opus reginæ ii uncias auri. ——Herefordscire. In Lene, &c. consuetud. ut præpositus manerii veniente domina sua (regina) in muner. præsentaret ei xviii oras denar. ut esset ipsa læto animo.* Pryn. Append. to *Aur. Reg.* 2.3.

[p] *Causa coadunandi lanam reginæ.* Domesd. *ibid.*

[q] *Civitas Lundon. Pro oleo ad lamp. ad. reginæ. (Mag. rott. pipp. temp. Hen. II. ibid.)*

[r] *Vicecomes Berkescire, xvi l. pro.*

quently very costly, as one single robe in the fifth year of Henry II. stood the city of London in upwards of four-score pounds.[s] A practice somewhat similar to that of the eastern countries, where whole cities and provinces were specifically assigned to purchase particular parts of the queen's apparel.[t] And, for a farther addition to her income, this duty of queen-gold is supposed to have been originally granted; those matters of grace and favour, out of which it arose, being frequently obtained from the crown by the powerful intercession of the queen. There are traces of its payment, though obscure ones, in the book of domesday and in the great pipe-roll of Henry the first.[u] In the reign of Henry the second the manner of collecting it appears to have been well understood, and it forms a distinct head in the ancient dialogue of the exchequer[v] written in the time of that prince, and usually attributed to Gervase of Tilbury. From that time downwards it was regularly claimed and enjoyed by all the queen consorts of England till the death of Henry VIII.; though after the accession of the Tudor family the collecting of it seems to have been much neglected: and, there being no queen consort afterwards till [223]
the accession of James I., a period of near sixty years, its very nature and quantity became then a matter of doubt: and, being referred by the king to the chief justices and chief baron, their report of it was so very unfavourable,[w] that his consort queen Anne (though she claimed it) yet never thought proper to exact it. In 1635, 11 Car. I., a time fertile of expedients for raising money upon dormant precedents in our old records (of which ship-money was a fatal instance) the king, at the petition of his queen Henrietta Maria, issued out his writ[x] for levying it: but

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cappu reginæ. (*Mag. rott. pipp.* 19.—22 *Hen. II. ibid.*) *Civitas Lund. cordubanario reginæ xx s.* (*Mag. rot.* 2 *Hen. II.* Madox *Hist. Exch.* 419.)

[s] *Pro roba ad opus reginæ, quater xx l. & vi s. viii d.* (*Mag. rot.* 5 *Hen. II. ibid.* 250.)

[t] *Solere aiunt barbaros reges Persarum ac Syrorum—uxoribus civitates attribuere, hoc mado; hæc civitas mulieri redimiculum præbeat, hæc in collum, hæc in crines, &c.* (*Cic. in Verrem, lib.* 3. *cap.* 33.)

[u] See Madox *Disceptat. epistolar.* 74. Pryn. *Aur. Reg.* Append. 5.

[v] *lib.* 2. *c.* 26.

[w] Mr. Prynne, with some appearance of reason, insinuates, that their researches were very superficial. (*Aur. Reg.* 125.)

[x] 19 Rym. *Foed.* 721.

afterwards purchased it of his consort at the price of ten thousand pounds; finding it, perhaps, too trifling and troublesome to levy. And when afterwards, at the Restoration, by the abolition of the military tenures, and the fines that were consequent upon them, the little that legally remained of this revenue was reduced to almost nothing at all, in vain did Mr. Prynne, by a treatise which does honour to his abilities as a painful and judicious antiquary, endeavour to excite queen Catherine to revive this antiquated claim.

Her right to the whale.

Another ancient perquisite belonging to the queen consort, mentioned by all our old writers,[y] and therefore only worthy notice, is this; that on the taking of a whale on the coasts, which is a royal fish, it shall be divided between the king and queen; the head only being the king's property, and the tail of it the queen's. "*De sturgione observetur,* "*quod rex illum habebit integrum: de balena vero sufficit,* "*si rex habeat caput, et regina caudam.*" The reason of this whimsical division, as assigned by our ancient records,[z] was, to furnish the queen's wardrobe with whalebone. And the reason, as Mr. Christian has observed, is more whimsical than the division, for the whalebone lies entirely in the head.

As to the security of life and person she is on a par with the king.

But farther: though the queen is in all respects a subject, yet, in point of the security of her life and person, she is put on the same footing with the king. It is equally treason (by the statute 25 Edw. III.) to compass or imagine [224] the death of our lady the king's companion, as of the king himself: and to violate, or defile the queen consort, amounts to the same high crime; as well in the person committing the fact, as in the queen herself, if consenting. A law of Henry the eighth[a] made it treason also for any woman, who was not a virgin, to marry the king without informing him thereof: but this law was soon after repealed: it trespassing too strongly, as well on natural justice, as female modesty. If, however, the queen be accused of any species of treason, she shall (whether consort or dowager) be tried by the peers of parliament, as queen Ann Boleyn was in 28 Hen. VIII., and queen Caroline in the 1 George IV.

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[y] Bracton. *l.* 3. *c.* 3. Britton, c. 17. Flet. *l.* 1. *c.* 45 & 46.

[z] Pryn *Aur. Reg.* 127.

[a] Stat. 33 Hen. VIII. c. 21. Mr. Hargrave, n. to Co. Litt. 133, says that no such stat. can be found.

Husband of a queen regnant.

The husband of a queen regnant, as prince George of Denmark was to queen Anne, is her subject; and may be guilty of high treason against her: but, in the instance of conjugal infidelity, he is not subjected to the same penal restrictions. For which the reason seems to be, that, if a queen consort is unfaithful to the royal bed, this may debase or bastardize the heirs to the crown; but no such danger can be consequent on the infidelity of the husband to a queen regnant.

Queen dowager.

A queen *dowager* is the widow of the king, and as such enjoys most of the privileges belonging to her as queen consort. But it is not high treason to conspire her death; or to violate her chastity, for the same reason as was before alleged, because the succession to the crown is not thereby endangered. Yet still, *pro dignitate regali*, no man can marry a queen dowager without special licence from the king, on pain of forfeiting his lands and goods. This, sir Edward Coke[b] tells us, was enacted in parliament in 6 Hen. VI., though the statute be not in print. But she, though an alien born, shall still be entitled to dower after the king's demise, which no other alien is.[c] A queen dowager, when married again to a subject, doth not lose her regal dignity, as peeresses dowager do their peerage when they marry commoners. For Catherine, queen dowager of Henry V., though she married a private gentleman, Owen ap Meredith ap Theodore, commonly called Owen Tudor; [225] yet, by the name of Katherine queen of England, maintained an action against the bishop of Carlisle. And so, the queen dowager of Navarre marrying with Edmond earl of Lancaster, brother to king Edward the first, maintained an action of dower (after the death of her second husband) by the name of queen of Navarre.[d]

The prince of Wales.

The prince of Wales, or heir apparent to the crown, and also his royal consort, and the princess royal, or eldest daughter of the king, are likewise peculiarly regarded by the laws. For, by statute 25 Edw. III., to compass or conspire the death of the former, or to violate the chastity of either of the latter, are as much high treason as to conspire the death of the king, or violate the chastity of the queen. And this upon the same reason, as was before given; because the prince of Wales is next in succession to the crown, and to violate his wife might taint the blood royal with bastardy: and the eldest daughter of the king for the time being is also alone inheritable to the crown, on failure of issue male, and therefore more respected by the laws than any of her younger sisters; insomuch that upon this, united with other (feodal) principles, while our military tenures were in force, the king might levy an aid for marrying his eldest daughter, and her only. The heir apparent to the crown is usually made prince of Wales and earl of Chester, by special creation, and investiture; but, being the king's eldest son, he is by inheritance duke of Cornwall, without any new creation.[e]

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[b] 2 Inst. 18. See Riley's Plac. Parl. 72.

[c] Co. Litt. 31.

[d] 2 Inst. 50.

The rest of the royal family.

The rest of the royal family may be considered in two different lights, according to the different senses in which the term, *royal family* is used. The larger sense includes all those, who are by any possibility inheritable to the crown. Such, before the Revolution, were all the descendants of William the Conqueror; who had branched into an amazing extent, by intermarriages with the ancient nobility. Since the Revolution and Act of Settlement, it means the protestant issue of the princess Sophia; now comparatively few in number, but which in process of time may possibly be as [226] largely diffused. The more confined sense includes only those, who are within a certain degree of propinquity to the reigning prince, and to whom therefore the law pays an extraordinary regard and respect: but, after that degree is past, they fall into the rank of ordinary subjects, and are seldom considered any farther, unless called to the succession upon failure of the nearer lines. For, though collateral consanguinity is regarded indefinitely, with respect to inheritance or succession, yet it is and can only be regarded within some certain limits in any other respect, by the natural constitution of things and the dictates of positive law.[f]

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[e] 8 Rep. 1. Seld. tit. of Hon. 2. 5. *Lomax* v. *Holmden*, 1 Ves. sen. 294.

[f] See *Essay on Collateral Consanguinity*, in Law-tracts, 4to. *Oxon*, 1771.

The younger sons and daughters of the king, and other branches of the royal family, who are not in the immediate line of succession, were therefore little farther regarded by the ancient law, than to give them to a certain degree precedence before all peers and public officers, as well ecclesiastical as temporal. This is done by the statute 31 Hen. VIII. c. 10, which enacts that no person, except the king's children, shall presume to sit or have place at the side of the cloth of estate in the parliament chamber; and that certain great officers therein named shall have precedence above all dukes, except only such as shall happen to be the king's son, brother, uncle, nephew (which sir Edward Coke[g] explains to signify grandson or *nepos*) or brother's or sister's son. Therefore, after these degrees are past, peers or others of the *blood royal* are entitled to no place or precedence except what belongs to them by their personal rank or dignity. Which made sir Edward Walker complain,[h] that by the hasty creation of prince Rupert to be duke of Cumberland, and of the earl of Lenox to be duke of that name, previous to the creation of king Charles's second son, James, to be duke of York, it might happen that their grandsons would have precedence of the grandsons of the duke of York.

Indeed, under the description of the king's *children* his *grandsons* are held to be included, without having recourse to sir Edward Coke's interpretation of *nephew:* and there- [225*] fore when his majesty king George II. created his grandson Edward, the second son of Frederick prince of Wales deceased, duke of York, and referred it to the house of lords to settle his place and precedence, they certified[i] that he ought to have place next to the late duke of Cumberland the then king's youngest son; and that he might have a seat on the left hand of the cloth of estate. But when, on the accession of king George III., those royal personages ceased to take place as the *children*, and ranked only as the *brother* and *uncle* of the king, they also left their seats on the side of the cloth of estate: so that when the duke of Gloucester, his majesty's second brother, took his seat in the house of peers,[j] he was placed on the upper end of the earl's bench (on which the dukes usually sit) next to his royal highness the duke of York. And in 1718, upon a question referred to all the judges by king George I., it was resolved by the opinion of ten against the other two, that the education and care of all the king's grandchildren while minors, did belong of right to his majesty as king of this realm, even during their father's life.[k] But they all agreed, that the care and approbation of their marriages, when grown up, belonged to the king their grandfather. And the judges have more recently concurred in opinion,[l] that this care and approbation extend also to the presumptive heir of the crown; though to what other branches of the royal family the same did extend they did not find precisely determined. The most frequent instances of the crown's interposition go no farther than nephews and nieces;[m] but examples are not wanting of its reaching to more distant collaterals.[n] And the statute 6 Hen. VI. before-mentioned, [226*] which prohibits the marriage of a queen dowager without the consent of the king, assigns this reason for it: "because "the disparagement of the queen shall give greater comfort "and example to other ladies of estate, who are of the *blood* "*royal*, more lightly to disparage themselves."[o] Therefore by the statute 28 Hen. VIII., c. 18, (repealed, among other statutes of treasons, by 1 Edw. VI. c. 12,) it was made high treason for any man to contract marriage with the king's children or reputed children, his sisters or aunts *ex parte paterna*, or the children of his brethren or sisters; being exactly the same degrees, to which precedence is allowed by the statute 31 Hen. VIII. before-mentioned. And now, by statute 12 Geo. III., c. 11, no descendant of the body of king George II. (other than the issue of princesses married into foreign families) is capable of contracting matrimony, without the previous consent of the king signified under the great seal; and any marriage contracted without such consent is void. Provided, that such of the said descendants, as are above the age of twenty-five, may after a twelvemonth's notice given to the king's privy council, contract and solemnize marriage without the consent of the crown; unless both houses of parliament shall, before the expiration of the said year, expressly declare their disapprobation of such intended marriage. And all persons solemnizing, assisting, or being present at, any such prohibited marriage, shall incur the penalties of the statute of *præmunire*.[p]

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[g] 4 Inst. 362.

[h] Tracts, p. 301.

[i] Lords' Journ. 24 Apr. 1760.

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[j] Lords' Journ. 10 Jan. 1765.

[k] Fortesc. Al. 401—440.

[l] Lords' Journ. 28 Feb. 1772.

[m] See (besides the instances cited in Fortescue Aland) for *brothers* and *sisters*; under king Edward III, 4 Rym. 392. 403. 411. 501. 508. 512. 549. 683:—under Henry V. 9 Rym. 710, 711. 741:—under Edward IV. 11 Rym. 564, 565 590. 601:—under Henry VIII. 13 Rym. 249. 423:—under Edw. VI. 7 St. Tr. 3. 8. For *nephews* and *nieces*; under Henry III. 1 Rym. 852:—under Edward I. 2 Rym. 489:—under Edward III. 5 Rym. 561:—under Richard II. 7 Rym. 264:—under Richard III. 12 Rym. 232. 244:—under Henry VIII. 15 Rym. 26. 31.

[n] To *great nieces*; under Edward II. 3 Rym. 575. 644. To *first cousins*; under Edward III. 5 Rym. 177. To *second* and *third cousins*; under Edward III. 5 Rym. 729:—under Richard II. 7 Rym. 225:—under Henry VI. 10 Rym. 322: under Henry VII. 12 Rym. 529:—under queen Elizabeth, Camd. Ann. A. D. 1562. To *fourth cousins*; under Henry VII. 12 Rym. 329. To the *blood-royal* in general; under Richard II. 7 Rym. 787.

[o] Ril. Plac. Parl. 672.

[p] As to the expenses of the queen and the royal family, see *post*, Chap. VIII.

CHAPTER THE FIFTH.

OF THE COUNCILS BELONGING TO THE KING.

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[227] **The king's councils.** THE third point of view, in which we are to consider the king, is with regard to his councils. For, in order to assist him in the discharge of his duties, the maintenance of his dignity, and the exertion of his prerogative, the law hath assigned him a diversity of councils to advise with.

1. The high court of parliament. 1. The first of these is the high court of parliament, whereof we have already treated at large.

2. The peers of the realm. 2. Secondly, the peers of the realm are by their birth hereditary counsellors of the crown, and may be called together by the king to impart their advice in all matters of importance to the realm, either in time of parliament, or, which hath been their principal use, when there is no parliament in being.[a] Accordingly Bracton,[b] speaking of the nobility of his time, says they might properly be called "*consules, a consulendo; reges enim tales sibi associant ad* "*consulendum.*" And in our law books[c] it is laid down, that peers are created for two reasons: 1. *Ad consulendum,* 2. *Ad defendendum, regem:* on which account the law gives them certain great and high privileges: such as freedom from arrests, &c. even when no parliament is sitting: because it intends, that they are always assisting the king with their counsel for the commonwealth, or keeping the realm in safety by their prowess and valour.

[228] Instances of conventions of the peers, to advise the king,

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[a] Co. Litt. 110.

[b] *l.* 1. *c.* 8.

[c] 7 Rep. 34. 9 Rep. 49. 12 Rep 96.

have been in former times very frequent; though now fallen into disuse, by reason of the more regular meetings of parliament. Sir Edward Coke[d] gives us an extract of a record, 5 Hen. IV. concerning an exchange of lands between the king and the earl of Northumberland, wherein the value of each was agreed to be settled by advice of parliament (if any should be called before the feast of saint Lucia) or otherwise by advice of the grand council of peers which the king promises to assemble before the said feast, in case no parliament shall be called. Many other instances of this kind of meeting are to be found under our ancient kings: though the formal method of convoking them had been so long left off, that when king Charles I. in 1640 issued out writs under the great seal to call a great council of all the peers of England to meet and attend his majesty at York, previous to the meeting of the long parliament, the earl of Clarendon[e] mentions it as a new invention, not before heard of; that is, as he explains himself, so old, that it had not been practised in some hundreds of years. But, though there had not so long before been an instance, nor has there been any since, of assembling them in so solemn a manner, yet, in cases of emergency, our princes have at several times thought proper to call for and consult as many of the nobility as could easily be got together: as was particularly the case with king James the second, after the landing of the prince of Orange; and with the prince of Orange himself, before he called that convention parliament, which afterwards called him to the throne.

Collectively and

Besides this general meeting, it is usually looked upon to be the right of each particular peer of the realm to demand an audience of the king, and to lay before him, with decency and respect, such matters as he shall judge of importance to the public weal. And therefore, in the reign of Edward II. it was made an article of impeachment in parliament against the two Hugh Spencers, father and son, for which they were banished the kingdom, "that they by their evil "covin would not suffer the great men of the realm, the "king's good counsellors, to speak with the king, or to "come near him; but only in the presence and hearing of

Individually.

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[d] 1 Inst. 110.

[e] Hist. b. 2.

"the said Hugh the father and Hugh the son, or one of "them, and at their will, and according to such things as "pleased them."[f]

3. The judges.

3. A third council belonging to the king, are, according to sir Edward Coke,[g] his judges of the courts of law, for law matters. And this appears frequently in our statutes, particularly 14 Edw. III. c. 5, and in other books of law. So that when the king's council is mentioned generally, it must be defined, particularized, and understood, *secundum subjectam materiam:* and, if the subject be of a legal nature, then by the king's council is understood his council for matters of law; namely, his judges. Therefore when by statute 16 Ric. II. c. 5, it was made a high offence to import into this kingdom any papal bulles, or other processes from Rome; and it was enacted, that the offenders should be attached by their bodies, and brought before the king and his *council* to answer for such offence; here, by the [229] expression of the king's *council*, were understood, according to Blackstone, the king's judges of his courts of justice, the subject matter being legal: this being the general way of interpreting the word, *council*.[h] This, however has been doubted by Mr. Justice Coleridge, in his note on the passage, who thinks that the council here mentioned was a court of very extensive equitable jurisdiction, both in civil and criminal matters; the fountain from which, in process of time, the courts of chancery and star-chamber were derived. The king's power to consult the judges extra-judicially, although not without precedent in former times, is now much disputed,[i] and has of late never been exercised.

King's power to consult the judges extra-judicially.

4. The privy council.

4. But the principal council belonging to the king is his privy council, which is generally called, by way of eminence, *the council*. And this, according to sir Edward Coke's description of it,[j] is a noble, honourable, and reverend assembly, of the king and such as he wills to be of his privy council, in the king's court or palace. The king's will is the sole constituent of a privy counsellor; and this also

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[f] 4 Inst. 53

[g] 1 Inst. 110.

[h] 3 Inst. 125.

[i] See Harg. n. 5, Co. Litt. 110 a.

[j] 4 Inst. 53.

regulates their number, which of ancient time was twelve or thereabouts. Afterwards it increased to so large a number, that it was found inconvenient for secrecy and dispatch; and therefore king Charles the second in 1679 limited it to thirty: whereof fifteen were to be the principal [230] officers of state, and those to be counsellors, *virtute officii;* and the other fifteen were composed of ten lords and five commoners of the king's choosing.[k] But since that time the number has been much augmented, and now continues indefinite. At the same time also, the ancient office of lord president of the council was revived in the person of Anthony earl of Shaftesbury; an officer, that by the statute of 31 Hen. VIII. c. 10, has precedence next after the lord chancellor and lord treasurer. No inconvenience arises from the extension of the numbers of the privy council, as those only attend who are specially summoned for the particular occasion upon which their advice and assistance are required.

Privy counsellors are now specially summoned.

How privy counsellors are made.

Privy counsellors are *made* by the king's nomination, without either patent or grant; and, on taking the necessary oaths, they become immediately privy counsellors during the life of the king that chooses them, but subject to removal at his discretion.

Their qualications.

As to the *qualifications* of members to sit at this board: any natural born subject of England is capable of being a member of the privy council; taking the proper oaths for security of the government, and the declaration[l] for security of the church. But, in order to prevent any persons under foreign attachments from insinuating themselves into this important trust, as happened in the reign of king William in many instances, it is enacted by the act of settlement,[m] that no person born out of the dominions of the crown of England, unless born of English parents, even though naturalized by parliament, shall be capable of being of the privy council.

Their duty.

The *duty* of a privy counsellor appears from the oath of office,[n] which consists of seven articles: 1. To advise the king according to the best of his cunning and discretion. 2. To advise for the king's honour and good of the public, without partiality through affection, love, meed, doubt, or dread. 3. To keep the king's counsel secret. 4. To avoid corruption. 5. To help and strengthen the execution of [231] what shall be there resolved. 6. To withstand all persons who would attempt the contrary. And, lastly, in general, 7. To observe, keep and do all that a good and true counsellor ought to do to his sovereign lord.

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[k] Temple's Mem. part 3.

[l] This declaration is imposed by the 9 Geo. IV. c. 17, and 2 Wm. IV. c. 7, which abolished the former sacramental test.

[m] Stat. 12 & 13 Wm. III. c. 2.

Their power. The *power* of the privy council is to inquire into all offences against the government, and to commit the offenders to safe custody, in order to take their trial in some of the courts of law. But their jurisdiction herein is only to inquire, and not to punish: and the persons committed by them are entitled to their *habeas corpus* by statute 16 Car. I. c. 10, as much as if committed by an ordinary justice of the peace. And, by the same statute, the court of star-chamber, and the court of requests, both of which consisted of privy counsellors, were dissolved; and it was declared illegal for them to take cognizance of any matter of property belonging to the subjects of this kingdom. But, in plantation or admiralty causes, which arise out of the jurisdiction of this kingdom; and in matters of lunacy or idiocy,[o] being a special flower of the prerogative; with regard to these, although they may eventually involve questions of extensive property, the privy council continues to have cognizance, being the court of appeal in such cases: or, rather, the appeal lies to the king's majesty himself in council. Whenever also a question arises between two provinces in America or elsewhere, as concerning the extent of their charters and the like, the king in his council exercises *original* jurisdiction therein, upon the principles of feudal sovereignty. And so likewise when any person claims an island or a province, in the nature of a feudal principality, by grant from the king or his ancestors, the determination of that right belongs to his majesty in council: as was the case of the earl of Derby with regard to the isle of Man in the reign of queen Elizabeth, and the earl of Cardigan and others, as representatives of the duke of Montague, with relation to the island of St. Vincent in 1764. But from all the dominions of the crown excepting Great Britain and Ireland, an *appellate* jurisdiction (in the last resort) is vested in the same tribunal; and this [232] judicial authority has lately been remodelled by a statute of the late king.[p] By this act a committee styled "the Judicial Committee of the Privy Council," is created, and is composed of the president of the council, the lord chancellor, the chief justice of the court of king's bench, the master of the rolls, the vice-chancellor, the chief justice of the common pleas, the lord chief baron, the judge of the prerogative court, the judge of the high court of admiralty, the chief judge in bankruptcy, the members of the privy council who shall have held any of these offices, and two other privy counsellors appointed by the king, who shall have held the office of judge in the East Indies, or any of the king's dominions beyond seas. This court has jurisdiction over all appeals made to the king in council from the courts of admiralty, or any other court in the plantations of America and other his majesty's dominions abroad.

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[n] 4 Inst. 54.

[o] 3 P. Wms. 108.

The judicial committee of the privy council.

The *privileges* of privy counsellors, as such, (abstracted from their honorary precedence)[q] consist principally in the security which the law has given them against attempts and conspiracies to destroy their lives. For, by statute 3 Hen. VII. c. 14, if any of the king's servants, of his household, conspire or imagine to take away the life of a privy counsellor, it is felony, though nothing be done upon it. The reason of making this statute, sir Edward Coke[r] tells us, was because such a conspiracy was, just before this parliament, made by some of king Henry the seventh's household servants, and great mischief was like to have ensued thereupon. This extends only to the king's menial servants. But the statute 9 Ann. c. 16, goes farther, and enacts, that *any person* that shall unlawfully attempt to kill, or shall unlawfully assault, and strike, or wound, any privy counsellor in the execution of his office, shall be a felon without benefit of clergy. This statute was made upon the daring attempt of the sieur Guiscard, who stabbed Mr. Harley, afterwards earl of

Their privileges.

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[p] 3 & 4 Wm. IV. c. 41.

[q] See *post*, chap. XII.

[r] 3 Inst. 38.

Oxford, with a penknife, when under examination for high crimes in a committee of the privy council.

The dissolution of the privy council.

The *dissolution* of the privy council depends upon the king's pleasure; and he may, whenever he thinks proper, discharge any particular member, or the whole of it, and appoint another. By the common law also it was dissolved *ipso facto* by the king's demise; as deriving all its authority from him. But now, to prevent the inconveniences of having no council in being at the accession of a new prince, it is enacted by statute 6 Ann. c. 7, that the privy council shall continue for six months after the demise of the crown, unless sooner determined by the successor.

Importance of the privy council diminished.

Cabinet council.

The importance of the privy council as a whole, it is to be observed, has much diminished. Its judicial business is transacted by the Judicial Committee, and almost all the executive authority is committed to the cabinet council, which consists of those ministers of state who are more especially honoured with the sovereign's confidence. Their number and selection depend only on the royal pleasure, and each member of that council receives a summons for every attendance.

CHAPTER THE SIXTH.

OF THE KING'S DUTIES.

I proceed next to the duties incumbent on the king by [233] our constitution; in consideration of which duties his dignity and prerogative are established by the laws of the land; it being a maxim in the law, that protection and subjection are reciprocal.[a] And these reciprocal duties are what, I apprehend, were meant by the convention in 1688, when they declared that king James had broken the *original contract* between king and people. But however, as the terms of that original contract were in some measure disputed, being alleged to exist principally in theory, and to be only deducible by reason and the rules of natural law; in which deduction different understandings might very considerably differ; it was, after the Revolution, judged proper to declare these duties expressly, and to reduce that contract to a plain certainty. So that, whatever doubts might be formerly raised by weak and scrupulous minds about the existence of such an original contract, they must now entirely cease; especially with regard to every prince, who hath reigned since the year 1688.

After the Revolution the king's duties were declared expressly.

The principal duty of the king is, to govern his people according to law. *Nec regibus infinita aut libera potestas,* was the constitution of our German ancestors on the continent.[b] And this is not only consonant to the principles of nature, of liberty, of reason, and of society, but has always been esteemed an express part of the common law of England, even when prerogative was at the highest. "The "king," saith Bracton,[c] who wrote under Henry III., "ought not to be subject to man, but to God, and to the

He is to govern according to law.

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[a] 7 Rep. 5.

[b] Tac. *de mor. Germ. c.* 7.

[c] *l.* 1. *c.* 8.

[234] "law; for the law maketh the king. Let the king therefore render to the law, what the law has invested in him "with regard to others: dominion and power: for he is not "truly king, where will and pleasure rules, and not the "law." And again;[d] "the king also hath a superior, namely "God, and also the law, by which he was made a king." Thus Bracton: and Fortescue also,[e] having first well distinguished between a monarchy absolutely and despotically regal, which is introduced by conquest and violence, and a political or civil monarchy, which arises from mutual consent; (of which last species he asserts the government of England to be) immediately lays it down as a principle, that "the king of England must rule his people according to the "decrees of the laws thereof: insomuch that he is bound "by an oath at his coronation to the observance and keeping of his own laws." But, to obviate all doubts and difficulties concerning this matter, it is expressly declared by statute 12 & 13 Wm. III. c. 2, "that the laws of England "are the birthright of the people thereof; and all the kings "and queens, who shall ascend the throne of this realm "ought to administer the government of the same according "to the said laws; and all their officers and ministers ought "to serve them respectively according to the same: and "therefore all the laws and statutes of this realm, for securing the established religion, and the rights and liberties "of the people thereof, and all other laws and statutes of "the same now in force, are ratified and confirmed accordingly."

The coronation oath.

And, as to the terms of the original contract between king and people, these I apprehend to be now couched in the coronation oath, which by the statute 1 W. & M. st. 1, c. 6, is to be administered to every king and queen, who shall succeed to the imperial crown of these realms, by one of the archbishops or bishops of the realm, in the presence of all the people; who on their parts do reciprocally take the oath of allegiance to the crown. This coronation oath is conceived in the following terms:

[235] "*The archbishop or bishop shall say,* Will you solemnly "promise and swear to govern the people of this kingdom of

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[d] *l. 2. c. 16. §. 3.*

[e] *c. 9. & 34.*

England, and the dominions thereto belonging, according to the statutes in parliament agreed on, and the laws and customs of the same?—*The king or queen shall say,* I solemnly promise so to do.—*Archbishop or bishop.* Will you to your power cause law and justice, in mercy, to be executed in all your judgments?—*King or queen.* I will. —*Archbishop or bishop.* Will you to the utmost of your power maintain the laws of God, the true profession of the gospel, and the protestant reformed religion established by the law? And will you preserve unto the bishops and clergy of this realm, and to the churches committed to their charge, all such rights and privileges as by law do or shall appertain unto them, or any of them?—*King or queen.* All this I promise to do.—*After this the king or queen, laying his or her hand upon the holy gospels, shall say,* The things which I have here before promised I will perform and keep: so help me God: *and then shall kiss the book.*"

This is the form of the coronation oath, as it is now prescribed by our laws; the principal articles of which appear to be at least as ancient as the mirror of justices,[f] and even as the time of Bracton:[g] but the wording of it was changed at the Revolution, because (as the statute alleges) the oath itself had been framed in doubtful words and expressions, with relation to ancient laws and constitutions at this time unknown.[h] However, in what form soever it [236] be conceived, this is most indisputably a fundamental and original express contract; though doubtless the duty of protection is impliedly as much incumbent on the sovereign before coronation as after: in the same manner as allegiance to the king becomes the duty of the subject immediately on the descent of the crown, before he has taken the oath of allegiance, or whether he ever takes it at all. This reciprocal duty of the subject will be considered in its proper place. At present we are only to observe, that in the king's part of this original contract are expressed all the duties that a monarch can owe to his people; *viz.* to govern according to law: to execute judgment in mercy; and to maintain the established religion. And, with respect to the latter of these three branches, we may farther remark, that by the act of union, 5 Ann. c. 8, two preceding statutes are recited and confirmed; the one of the parliament of Scotland, the other of the parliament of England: which enact; the former, that every king at his accession shall take and subscribe an oath, to preserve the protestant religion and presbyterian church government in Scotland; the latter, that at his coronation he shall take and subscribe a similar oath, to preserve the settlement of the church of England within England, Ireland, Wales, and Berwick, and the territories thereunto belonging.

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[f] *cap.* 1. §. 2.

[g] *l.* 3. *tr.* 1. *c.* 9.

[h] In the old folio abridgment of the statutes, printed by Lettou and Machlinia in the reign of Edward IV. (*penes me*) there is preserved a copy of the old coronation oath; which, as the book is extremely scarce, I will here transcribe. *Ceo est le serement que le roy jurre a soun coronement: que il gardera et meintenera lez droitez et lez franchisez de seynt esglise grauntez auncienment dez droitez roys christiens d'Engletere, et quil gardera toutez sez terrez honoures et dignites droiturelx et franks del coron du roialme d'Engletere en tout maner dentier te sanz null maner damenusement, et lez droitez disperges dilapidez ou perduz de la corone a soun poiair reappeller en launcien estate, et quil gardera le peas de seynt esglise et al clergie et al people de bon accorde, et quil face faire en toutez sez jugementez owel et droit justice oue discretion et misericorde, et quil grauntera a tenure lez leyes et custumez du roialme, et a soun poiar lez face garder et affirmer que lez gentez du people avont faitez et estiez, et les malveys leyz et custumes de tout oustera, et ferme peas et establie al people de soun roialme en ceo garde esgardera a soun poiair: come Dieu luy aide. (Tit. sacramentum regis. fol. m. ij.)* Prynne

He is to execute judgment in mercy, and to maintain the established religion.

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has also given us a copy of the coronation oaths of Richard II. (Signal Loyalty, II. 246.) Edward VI. (*ibid.* 251.) James I. and Charles I. (*ibid.* 269.)

CHAPTER THE SEVENTH.

OF THE KING's PREROGATIVE.

The royal prerogative as regards

- 1. The royal character.
  - 1. Sovereignty.
  - 2. Perfection.
  - 3. Perpetuity.
- 2. The royal authority.
  - 1. As to foreign concerns.
    - 1. Power of sending ambassadors.
    - 2. Of making treaties.
    - 3. Of making war and peace.
    - 4. Of granting letters of marque.
    - 5. Of granting safe conducts.
  - 2. As to domestic concerns.
    - 1. Of rejecting bills.
    - 2. Being generalissimo.
    - 3. The fountain of justice.
    - 4. The fountain of honour and wisdom.
    - 5. Arbiter of commerce.
    - 6. The head of the church.

[237]

The king's prerogative

IT was observed in a former chapter,[a] that one of the principal bulwarks of civil liberty, or (in other words) of the British constitution, was the limitation of the king's prerogative by bounds so certain and notorious, that it is impossible he should ever exceed them, without the consent of the people, on the one hand; or without, on the other, a violation of that original contract, which in all states impliedly, and in ours most expressly, subsists between the prince and the subject. It will now be our business to consider this prerogative minutely; to demonstrate its necessity in general; and to mark out in the most important instances its particular extent and restrictions: from which considerations this conclusion will evidently follow, that the powers, which are vested in the crown by the laws of England, are necessary for the support of society; and do not intrench any farther on our *natural* liberties, than is expedient for the maintenance of our *civil*.

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[a] Chap. 1, page 136.

may be discussed.

There cannot be a stronger proof of that genuine freedom, which is the boast of this age and country, than the power of discussing and examining, with decency and respect, the limits of the king's prerogative. A topic, that in some former ages was thought too delicate and sacred to be profaned by the pen of a subject. It was ranked among the *arcana imperii:* and, like the mysteries of the *bona dea*, [238] was not suffered to be pried into by any but such as were initiated in its service: because perhaps the exertion of the one, like the solemnities of the other, would not bear the inspection of a rational and sober inquiry. The glorious queen Elizabeth herself made no scruple to direct her parliaments to abstain from discoursing of matters of state;[b] and it was the constant language of this favourite princess and her ministers, that even that august assembly "ought "not to deal, to judge, or to meddle with her majesty's "prerogative royal."[c] And her successor, king James the first, who had imbibed high notions of the divinity of regal sway, more than once laid it down in his speeches, that, "as it is atheism and blasphemy in a creature to dispute "what the deity may do, so it is presumption and sedition "in a subject to dispute what a king may do in the height "of his power: good christians, he adds, will be content "with God's will, revealed in his word; and good subjects "will rest in the king's will, revealed in *his* law."[d]

This has ever been the language of the constitution.

But, whatever might be the sentiments of some of our princes, this was never the language of our ancient constitution and laws. The limitation of the regal authority was a first and essential principle in all the Gothic systems of government established in Europe; though gradually driven out and overborne, by violence and chicane, in most of the kingdoms on the continent. We have seen, in the preceding chapter, the sentiments of Bracton and Fortescue, at the distance of two centuries from each other. And sir

[b] Dewes. 479.

[c] *Ibid.* 645.

[d] King James's works, 557. 531.

Henry Finch, under Charles the first, after the lapse of two centuries more, though he lays down the law of prerogative in very strong and emphatical terms, yet qualifies it with a general restriction, in regard to the liberties of the people. "The king hath a prerogative in all things, that are not "injurious to the subject; for in them all it must be re-"membered, that the king's prerogative stretcheth not to "the doing of any wrong."[e] *Nihil enim aliud potest rex, nisi id solum quod de jure potest.*[f] And here it may be [239] some satisfaction to remark, how widely the civil law differs from our own, with regard to the authority of the laws over the prince, or (as a civilian would rather have expressed it) the authority of the prince over the laws. It is a maxim of the English law, as we have seen from Bracton, that "*rex debet esse sub lege, quia lex facit regem:*" the imperial law will tell us, that, "*in omnibus, imperatoris excipitur fortuna; cui ipsas leges Deus subjecit.*"[g] We shall not long hesitate to which of them to give the preference, as most conducive to those ends for which societies were framed, and are kept together; especially as the Roman lawyers themselves seem to be sensible of the unreasonableness of their own constitution. "*Decet tamen principem,*" says Paulus, "*servare leges, quibus ipse solutus est.*"[h] This is at once laying down the principle of despotic power, and at the same time acknowledging its absurdity.

Definition of the king's prerogative.

By the word prerogative we usually understand that special pre-eminence, which the king hath, over and above all other persons, and out of the ordinary course of the common law, in right of his real dignity. It signifies, in its etymology, (from *præ* and *rogo*) something that is required or demanded before, or in preference to, all others. And hence it follows, that it must be in its nature singular and eccentrical; that it can only be applied to those rights and capacities which the king enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects: for if once any one prerogative of the crown could be held in common with the subject, it would cease to be prerogative any longer. And therefore Finch[i] lays it down as a maxim, that the prerogative is that law in case of the king, which is law in no case of the subject.

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[e] Finch L. 84, 85.

[f] Bracton, *l.* 3. *tr.* 1. *c.* 9.

[g] *Nov.* 105. §. 2.

[h] *Ff.* 32. 1. 3.

It is either direct or incidental.

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Prerogatives are either *direct* or *incidental.* The *direct* are such positive substantial parts of the royal character and authority, as are rooted in and spring from the king's political person, considered merely by itself, without reference to any other extrinsic circumstance; as, the right of sending ambassadors, of creating peers, and of making war or peace. But such prerogatives as are *incidental* bear always a relation to something else, distinct from the king's person; and are indeed only exceptions, in favour of the crown, to those general rules that are established for the rest of the community: such as, that no costs shall be recovered against the king; that the king can never be a joint-tenant; and that his debt shall be preferred before a debt to any of his subjects. These, and an infinite number of other instances, will better be understood, when we come regularly to consider the rules themselves, to which these incidental prerogatives are exceptions. And therefore we will at present only dwell upon the king's substantive or direct prerogatives.

The direct prerogative is of three kinds; being such as regard, 1. the royal character, or dignity; 2. his royal authority or power, and 3. the royal income.

These substantive or direct prerogatives may again be divided into three kinds: being such as regard, first, the king's royal *character;* secondly, his royal *authority;* and, lastly, his royal *income.* These are necessary, to secure reverence to his person, obedience to his commands, and an affluent supply for the ordinary expences of government; without all of which it is impossible to maintain the executive power in due independence and vigour. Yet, in every branch of this large and extensive dominion, our free constitution has interposed such seasonable checks and restrictions, as may curb it from trampling on those liberties, which it was meant to secure and establish. The enormous weight of prerogative, if left to itself, (as in arbitrary governments it is) spreads havoc and destruction among all the inferior movements: but, when balanced and regulated (as with us) by its proper counterpoise, timely and judiciously applied, its operations are then equable and certain, it invigorates the whole machine, and enables every part to answer the end of its construction.

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[i] Finch, L. 85.

In the present chapter we shall only consider the two first of these divisions, which relate to the king's political *character* and *authority:* or, in other words, his *dignity* [241] and regal *power;* to which last the name of prerogative is frequently narrowed and confined. The other division, which forms the royal *revenue,* will require a distinct examination; according to the known distribution of the feodal writers, who distinguish the royal prerogatives into the *majora* and *minora regalia,* in the latter of which classes the rights of the revenue are ranked. For, to use their own words, "*majora regalia imperii præ-eminentiam spectant;* "*minora vero ad commodum pecuniarium immediate atti-* "*nent; et hæc proprie fiscalia sunt, et ad jus fisci per-* "*tinent.*"[j]

I. The royal dignity consists

First, then, of the royal dignity. Under every monarchical establishment, it is necessary to distinguish the prince from his subjects, not only by the outward pomp and decorations of majesty, but also by ascribing to him certain qualities, as inherent in his royal capacity, distinct from and superior to those of any other individual in the nation. For, though a philosophical mind will consider the royal person merely as one man appointed by mutual consent to preside over many others, and will pay him that reverence and duty which the principles of society demand, yet the mass of mankind will be apt to grow insolent and refractory, if taught to consider their prince as a man of no greater perfection than themselves. The law therefore ascribes to the king, in his high political character, not only large powers and emoluments, which form his prerogative and revenue, but likewise certain attributes of a great and transcendent nature; by which the people are led to consider him in the light of a superior being, and to pay him that awful respect, which may enable him with greater ease to carry on the business of government. This is what I understand by the royal dignity, the several branches of which we will now proceed to examine.

1. in the king's sovereignty.

1. And, first, the law ascribes to the king the attribute of

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[j] *Peregrin. de jure fisc. l.* 1. *c.* 1. *num.* 9.

sovereignty or pre-eminence. "*Rex est vicarius*," says Bracton,[k] "*et minister Dei in terra: omnis quidem sub eo* [242] "*est, et ipse sub nullo, nisi tantum sub Deo.*" He is said to have *imperial* dignity; and in charters before the conquest is frequently styled *basileus* and *imperator*, the titles respectively assumed by the emperors of the east and west.[l] His realm is declared to be an *empire*, and his crown *imperial*, by many acts of parliament, particularly the statutes 24 Hen. VIII. c. 12, and 25 Hen. VIII. c. 28;[m] which at the same time declare the king to be the supreme head of the realm in matters both civil and ecclesiastical, and of consequence inferior to no man upon earth, dependent on no man, accountable to no man. Formerly there prevailed a ridiculous notion, propagated by the German and Italian civilians, that an emperor could do many things which a king could not, (as the creation of notaries and the like) and that all kings were in some degree subordinate and subject to the emperor of Germany or Rome. The meaning therefore of the legislature, when it uses these terms of *empire* and *imperial*, and applies them to the realm and crown of England, is only to assert that our king is equally sovereign and independent within these his dominions, as any emperor is in his empire;[n] and owes no kind of subjection to any other potentate upon earth. Hence it is, that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power: authority to try would be vain and idle, without an authority to redress; and the sentence of a court would be contemptible, unless that court had power to command the execution of it: but who, says Finch[o], shall command the king? Hence it is likewise, that by law the person of the king is sacred, even though the measures pursued in his reign be completely tyrannical and arbitrary: for no jurisdiction upon earth has power to try him in a criminal way; much less to condemn him to punishment. If any foreign jurisdiction had this power, as was formerly claimed by the pope, the independence of the kingdom would be no more; and, if such a power were vested in any domestic tribunal, there would soon be an end of the [243] constitution, by destroying the free agency of one of the constituent parts of the sovereign legislative power.

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[k] *l.* 1. *c.* 8.

[l] Seld. tit. of Hon. I. 2.

[m] See also 24 Geo. II. c. 24. 5 Geo. III. c. 27.

[n] *Rex allegavit, quod ipso omnes libertates haberet in regno suo, quas imperator vindicabat in imperio.* (M. Paris, *A. D.* 1095.)

[o] Finch, L. 83.

Remedy provided against private injuries or public oppressions of the crown

Are then, it may be asked, the subjects of England totally destitute of remedy, in case the crown should invade their rights, either by private injuries, or public oppressions? To this we may answer, that the law has provided a remedy in both cases.

Private injuries.

Petition of right.

And, first, as to private injuries: if any person has, in point of property, a just demand upon the king, he must petition him in his court of chancery, by what is called a *petition of right*, where his chancellor will administer right as a matter of grace, though not upon compulsion.[p] And this is entirely consonant to what is laid down by the writers on natural law. "A subject," says Puffendorf,[q] "so long as "he continues a subject, hath no way to *oblige* his prince to "give him his due, when he refuses it; though no wise "prince will ever refuse to stand to a lawful contract. And, "if the prince gives the subject leave to enter an action "against him, upon such contract, in his own courts, the "action itself proceeds rather upon natural equity, than "upon the municipal laws." For the end of such action is not to *compel* the prince to observe the contract, but to *persuade* him. And, as to personal wrongs; it is well observed by Mr. Locke,[r] "the harm which the sovereign can do in "his own person not being likely to happen often, nor to "extend itself far; nor being able by his single strength to "subvert the laws, nor oppress the body of the people, "(should any prince have so much weakness and ill-nature "as to endeavour to do it)—the inconveniency therefore of "some particular mischiefs, that may happen sometimes, "when a heady prince comes to the throne, are well recompensed by the peace of the public and security of the

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[p] Finch, L. 255. *Reeve* v. *Attorney General*, 1 Ves. 445. Mitf. Pl. 24. The queen has also the same prerogative. 2 Roll. Ab. 213. Staunf. Prerog. 75.

[q] Law of N. and N. b. 8. c. 10.

[r] on Gov. p. 2. §. 205.

"government, in the person of the chief magistrate being "thus set out of the reach of danger."

[244] **Public oppression.** Next, as to cases of ordinary public oppression, where the vitals of the constitution are not attacked, the law hath also assigned a remedy. For as a king cannot misuse his power without the advice of evil counsellors, and the assistance of wicked ministers, these men may be examined and punished. The constitution has therefore provided, by means of indictments, and parliamentary impeachments, that no man shall dare to assist the crown in contradiction to the laws of the land. But it is at the same time a maxim in those laws, that the king himself can do no wrong: since it would be a great weakness and absurdity in any system of positive law, to define any possible wrong, without any possible redress.

Remedy where public oppression tends to dissolve the constitution. For, as to such public oppressions as tend to dissolve the constitution, and subvert the fundamentals of government, they are cases, which the law will not, out of decency, suppose: being incapable of distrusting those, whom it has invested with any part of the supreme power; since such distrust would render the exercise of that power precarious and impracticable.[8] For, wherever the law expresses its distrust of abuse of power, it always vests a superior coercive authority in some other hand to correct it; the very notion of which destroys the idea of sovereignty. If therefore (for example) the two houses of parliament, or either of them, had avowedly a right to animadvert on the king, or each other, or if the king had a right to animadvert on either of the houses, that branch of the legislature, so subject to animadversion, would instantly cease to be part of the supreme power; the balance of the constitution would be overturned; and that branch or branches, in which this jurisdiction resided, would be completely sovereign. The supposition of *law* therefore is that neither the king nor either house of parliament (collectively taken) is capable of doing any wrong; since in such cases the law feels itself incapable of furnishing any adequate [245] remedy. For which reason all oppressions, which may happen to spring from any branch of the sovereign power, must necessarily be out of the reach of any *stated rule*, or *express legal* provision: but, if ever they unfortunately happen, the prudence of the times must provide new remedies upon new emergencies.

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[8] See these points more fully discussed in the *Considerations of the Law of Forfeiture*, 3rd edit. pag. 109—126, wherein Blackstone has thrown many new and important lights on the texture of our happy constitution.

Indeed, it is found by experience, that whenever the unconstitutional oppressions, even of the sovereign power, advance with gigantic strides and threaten desolation to a state, mankind will not be reasoned out of the feelings of humanity; nor will sacrifice their liberty by a scrupulous adherence to those political maxims, which were originally established to preserve it. And therefore, though the positive laws are silent, experience will furnish us with a very remarkable case, wherein nature and reason prevailed. When king James the second invaded the fundamental constitution of the realm, the convention declared an abdication, whereby the throne was rendered vacant, which induced a new settlement of the crown. And so far as this precedent leads, and no farther, we may now be allowed to lay down the *law* of redress against public oppression. If therefore any future prince should endeavour to subvert the constitution by breaking the original contract between king and people, should violate the fundamental laws, and should withdraw himself out of the kingdom; we are now authorized to declare that this conjunction of circumstances would amount to an abdication, and the throne would be thereby vacant. But it is not for us to say that any one, or two, of these ingredients would amount to such a situation; for there our precedent would fail us. In these therefore, or other circumstances, which a fertile imagination may furnish, since both law and history are silent, it becomes us to be silent too; leaving to future generations, whenever necessity and the safety of the whole shall require it, the exertion of those inherent (though latent) powers of society, which no climate, no time, no constitution, no contract, can ever destroy or diminish.

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2. The king's perfection.

II. Besides the attribute of sovereignty, the law also ascribes to the king, in his political capacity, absolute *perfection*. The king can do no wrong. Which ancient and fundamental maxim is not to be understood, as if every thing transacted by the government was of course just and lawful, but means only two things. First, that whatever is exceptionable in the conduct of public affairs is not to be imputed to the king, nor is he answerable for it personally to his people: for this doctrine would totally destroy that constitutional independence of the crown, which is necessary for the balance of power in our free and active, and therefore compounded, constitution. And, secondly, it means that the prerogative of the crown extends not to do any injury; it is created for the benefit of the people, and therefore cannot be exerted to their prejudice.[t]

He is incapable either of doing or thinking wrong.

The king, moreover, is not only incapable of *doing* wrong, but even of *thinking* wrong; he can never mean to do an improper thing: in him is no folly or weakness. And therefore if the crown should be induced to grant any franchise or privilege to a subject contrary to reason, or in any wise prejudicial to the commonwealth, or a private person, the law will not suppose the king to have meant either an unwise or an injurious action, but declares that the king was deceived in his grant; and thereupon such grant is rendered void, merely upon the foundation of fraud and deception, either by or upon those agents, whom the crown has thought proper to employ. For the law will not cast an imputation on that magistrate whom it intrusts with the executive power, as if he was capable of intentionally disregarding his trust: but attributes to mere imposition (to which the most perfect of sublunary beings must still continue liable) those little inadvertencies, which, if charged on the will of the prince, might lessen him in the eyes of his subjects.

Consequences of this maxim.

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Power of the houses of parliament to remonstrate with the king.

Yet still, notwithstanding this personal perfection, which the law attributes to the sovereign, the constitution has allowed a latitude of supposing the contrary, in respect to both houses of parliament; each of which, in its turn, hath exerted the right of remonstrating and complaining to the king even of those acts of royalty, which are most properly and personally his own; such as messages signed by himself, and speeches delivered from the throne. And yet, such is the reverence which is paid to the royal person, that though the two houses have an undoubted right to consider these acts of state in any light whatever, and accordingly treat them in their addresses as personally proceeding from the prince, yet among themselves, (to preserve the more perfect decency, and for the greater freedom of debate) they usually suppose them to flow from the advice of the administration. But the privilege of canvassing thus freely the personal acts of the sovereign (either directly, or even through the medium of his reputed advisers) belongs to no individual, but is confined to those august assemblies: and there too the objections must be proposed with the utmost respect and deference. One member was sent to the tower,[u] for suggesting that his majesty's answer to the address of the commons contained "high words to "fright the members out of their duty;" and another,[v] for saying that a part of the king's speech "seemed rather to "be calculated for the meridian of Germany than Great "Britain, and that the king was a stranger to our language "and constitution."

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[t] Plowd. 487.

In the king can be no negligence or *laches.*

In farther pursuance of this principle, the law also determines that in the king can be no negligence, or *laches*, and therefore no delay will bar his right. *Nullum tempus occurrit regi* has been the standing maxim upon all occasions: for the law intends that the king is always busied for the public good, and therefore has not leisure to assert his right within the times limited to subjects.[w] In the king also can be no stain or corruption of blood: for if the heir [248] to the crown were attainted of treason or felony, and afterwards the crown should descend to him, this would purge the attainder *ipso facto*.[x] And therefore when Henry VII. who as earl of Richmond stood attainted, came to the crown, it was not thought necessary to pass an act of parliament to reverse this attainder; because, as lord Bacon in his history of that prince informs us, it was agreed that the assumption of the crown had at once purged all attainders. Neither can the king in judgment of law, as king, ever be a minor or under age; and therefore his royal grants and assents to acts of parliament are good, though he has not in his natural capacity attained the legal age of twenty-one.[y] By a statute indeed, 28 Hen. VIII. c. 17, power was given to future kings to rescind and revoke all acts of parliament that should be made while they were under the age of twenty-four: but this was repealed by the statute 1 Edw. VI. c. 11, so far as related to that prince; and both statutes are declared to be determined by 24 Geo. II. c. 24. It hath also been usually thought prudent, when the heir apparent has been very young, to appoint a protector, guardian, or regent, for a limited time; but the very necessity of such extraordinary provision is sufficient to demonstrate the truth of that maxim of the common law, that in the king is no minority; and therefore he hath no legal guardian.[z]

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[u] Com. Journ. 18 Nov. 1685.

[v] *Ibid.* 4 Dec. 1717.

[w] Finch, L. 82. Co. Litt. 90.

[x] Finch, L. 82.

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[y] Co. Litt. 43. 2 Inst. proëm. 3.

[z] The methods of appointing this guardian or regent have been so various, and the duration of his power so uncertain, that from hence alone it may be collected that his office is unknown to the common law; and therefore (as Sir Edward Coke says, 4 Inst. 58,) the surest way is to have him made by authority of the great council in parliament. The earl of Pembroke, by his own authority, assumed in very troublesome times the regency of Henry III., who was then only nine years old; but was declared of full age by the pope at seventeen, confirmed the great charter at eighteen, and took upon him the administration of the government at twenty. A guardian and council of regency were named for Edward III. by the parliament, which deposed his father; the young king being then fifteen, and not assuming the government till three years after. When Richard II. succeeded at the age of eleven, the duke of Lancaster took upon him the management of the kingdom, till the parliament met, which appointed a nominal council to assist him. Henry V. on his death-bed named a regent and a guardian for his infant son Henry VI., then nine months old; but the parliament altered his disposition, and appointed a protector and council, with a special limited authority. Both these princes remained in a state of pupilage till the age of twenty-three. Edward V., at the age of thirteen, was recommended by his father to the care of the duke of Gloucester; who was declared protector by the privy council. The statutes 25 Hen. VIII. c. 12, and 28 Hen. VIII. c. 7, provided, that the successor, if a male, and under eighteen, or if a female and under sixteen, should be till such age in the government of his or her natural mother, (if approved by the king) and such other counsellors as his majesty should by will or otherwise appoint; and he accordingly appointed his sixteen executors to have the government of his son Edward VI., and the kingdom, which executors elected the earl of Hertford protector. The statute 24 Geo. II. c. 24, in case the crown should descend to any of the children of Frederic Prince of Wales under the age of eighteen, appointed the princess dowager;—and that of 5 Geo. III. c. 27, in case of a like descent to any of his children, empowered the king to name either the queen,

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3. The king's perpetuity.

III. A third attribute of the king's majesty is his *perpetuity*. The law ascribes to him, in his political capacity, an absolute immortality. The king never dies. Henry, Edward, or George may die; but the king survives them all. For immediately upon the decease of the reigning prince in his natural capacity, his kingship or imperial dignity, by act of law, without any *interregnum* or interval, is vested at once in his heir; who is, *eo instanti*, king to all intents and purposes. And so tender is the law of supposing even a possibility of his death, that his natural dissolution is generally called his *demise: demissio regis, vel coronæ:* an expression which signifies merely a transfer of property; for, as is observed in Plowden,[a] when we say the demise of the crown, we mean only that, in consequence of the disunion of the king's natural body from his body politic, the kingdom is transferred or demised to his successor; and so the royal dignity remains perpetual. Thus too, when Edward the fourth, in the tenth year of his reign, was driven from his throne for a few months by the house of Lancaster, this temporary transfer of his dignity was denominated his *demise:* and all process was held to be discontinued, as upon a natural death of the king.[b]

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II. The royal authority or power.

We are next to consider those branches of the royal prerogative, which invest thus our sovereign lord, thus all-perfect and immortal in his kingly capacity, with a number of authorities and powers; in the exertion whereof consists the executive part of government. This is wisely placed in a

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the princess dowager, or any descendant of king George II. residing in this kingdom;—to be guardian and regent, till the successor attains such age, assisted by a council of regency. By the 1 Wm. IV. c. 2, the present duchess of Kent was appointed the guardian of her daughter, her present majesty, until she attained the age of eighteen; and it was declared by the same act that the duchess should be the regent during the minority. Her majesty attained her majority at the age of eighteen years, and shortly afterwards, on the death of the late king, ascended the throne. The 1 Wm. IV. c. 2, was therefore repealed by the 1 & 2 Vict. c. 24. The powers of the regents are expressly defined and set down in the several acts. On the alienation of mind of George III., his son the Prince of Wales, afterwards George IV., was declared regent by express act of parliament, but provision was made for the resumption of the exercise of the royal authority by George III. 51 Geo. III. c. 1, amended by 53 Geo. III. c. 14, 58 Geo. III. c. 90.

[a] Plowd. 177, 234.

[b] M. 49 Hen. VI. pl. 1—8.

single hand by the British constitution, for the sake of unanimity, strength, and dispatch. Were it placed in many hands, it would be subject to many wills: many wills, if disunited and drawing different ways, create weakness in a government; and to unite those several wills, and reduce them to one, is a work of more time and delay than the exigencies of state will afford. The king of England is therefore not only the chief, but properly the sole, magistrate of the nation; all others acting by commission from, and in due subordination to him: in like manner as, upon the great revolution in the Roman state, all the powers of the ancient magistracy of the commonwealth were concentred in the new emperor: so that, as Gravina[c] expresses it, "*in ejus unius* "*persona veteris reipublicæ vis atque majestas per cumu-* "*latas magistratuum potestates exprimebatur.*"

How far absolute.

After what has been premised in this chapter, I shall not (I trust) be considered as an advocate for arbitrary power, when I lay it down as a principle, that, in the exertion of lawful prerogative, the king is and ought to be absolute; that is, so far absolute, that there is no legal authority that can either delay or resist him. He may reject what bills, may make what treaties, may coin what money, may create what peers, may pardon what offences he pleases: unless where the constitution hath expressly, or by evident consequence, laid down some exception or boundary; declaring, that thus far the prerogative shall go and no farther. For otherwise the power of the crown would indeed be but a name and a shadow, insufficient for the ends of government, if where its jurisdiction is clearly established and allowed, any man or body of men were permitted to disobey it, in the ordinary course of law: I say, in the *ordinary* course of law; for I do not [251] now speak of those *extraordinary* recourses to first principles, which are necessary when the contracts of society are in danger of dissolution, and the law proves too weak a defence against the violence of fraud or oppression. And yet the want of attending to this obvious distinction has occasioned these doctrines, of absolute power in the prince and of national resistance by the people, to be much misunderstood and perverted, by the advocates for slavery on the one hand,

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[c] *Orig.* 1. §. 103.

and the demagogues of faction on the other. The former, observing the absolute sovereignty and transcendent dominion of the crown laid down (as it certainly is) most strongly and emphatically in our law-books, as well as our homilies, have denied that any case can be excepted from so general and positive a rule; forgetting how impossible it is, in any practical system of laws, to point out beforehand those eccentrical remedies, which the sudden emergence of national distress may dictate, and which that alone can justify. On the other hand, over-zealous republicans, feeling the absurdity of unlimited passive obedience, have fancifully (or sometimes factiously) gone over to the other extreme: and, because resistance is justifiable to the person of the prince when the being of the state is endangered, and the public voice proclaims such resistance necessary, they have therefore allowed to every individual the right of determining this expedience, and of employing private force to resist even private oppression. A doctrine productive of anarchy, and (in consequence) equally fatal to civil liberty as tyranny itself. For civil liberty, rightly understood, consists in protecting the rights of individuals by the united force of society: society cannot be maintained, and of course can exert no protection, without obedience to some sovereign power: and obedience is an empty name, if every individual has a right to decide how far he himself shall obey.

If the exercise of this prerogative be grievous the king's advisers will be called to account.

In the exertion therefore of those prerogatives, which the law has given him, the king is irresistible and absolute, according to the forms of the constitution. And yet, if the consequence of that exertion be manifestly to the grievance or dishonour of the kingdom, the parliament will call his advisers to a just and severe account. For prerogative consisting [252] (as Mr. Locke[d] has well defined it) in the discretionary power of acting for the public good, where the positive laws are silent; if that discretionary power be abused to the public detriment, such prerogative is exerted in an unconstitutional manner. Thus the king may make a treaty with a foreign state, which shall irrevocably bind the nation; and yet, when such treaties have been judged pernicious, impeachments have pursued those ministers, by whose agency or advice they were concluded.

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[d] On Gov. 2. §. 166.

The authorities of the crown respect either this nation's intercourse with foreign countries or its own domestic policy.

The prerogatives of the crown (in the sense under which we are now considering them) respect either this nation's intercourse with foreign nations, or its own domestic government and civil polity.

I. As to foreign concerns.

With regard to foreign concerns, the king is the delegate or representative of his people. It is impossible that the individuals of a state, in their collective capacity, can transact the affairs of that state with another community equally numerous as themselves. Unanimity must be wanting to their measures, and strength to the execution of their counsels. In the king therefore, as in a centre, all the rays of his people are united, and form by that union a consistency, splendor, and power, that make him feared and respected by foreign potentates; who would scruple to enter into any engagement, that must afterwards be revised and ratified by a popular assembly. What is done by the royal authority, with regard to foreign powers, is the act of the whole nation: what is done without the king's concurrence is the act only of private men. And so far is this point carried by our law, that it hath been held,[e] that should all the subjects of England make war with a king in league with the king of England, without the royal assent, such war is no breach of the league. And, by the statute 2 Hen. V. c. 6, any subject committing acts of hostility upon any nation in league with the king was declared to be guilty of high treason: and, though that act was repealed by the statute 20 Hen. VI. [253] c. 11, so far as relates to the making this offence high treason, yet still it remains a very great offence against the law of nations, and punishable by our laws, either capitally or otherwise, according to the circumstances of the case.

1. The king has the power of sending and receiving ambassadors.

I. The king therefore, considered as the representative of his people, has the sole power of sending ambassadors to foreign states, and receiving ambassadors at home. This may lead us into a short digression, by way of inquiry, how far the municipal laws of England intermeddle with or protect the rights of these messengers from one potentate to another, whom we call ambassadors.

The rights and privileges of ambassadors.

The rights, the powers, the duties, and the privileges of ambassadors are determined by the law of nature and nations, and not by any municipal constitutions. For, as they represent the persons of their respective masters, who owe no subjection to any laws but those of their own country, their actions are not subject to the control of the private law of that state, wherein they are appointed to reside. He that is subject to the coercion of laws is necessarily dependent on that power by whom those laws were made: but an ambassador ought to be independent of every power, except that by which he is sent; and of consequence ought not to be subject to the mere municipal laws of that nation, wherein he is to exercise his functions. If he grossly offends, or makes an ill use of his character, he may be sent home and accused before his master;[f] who is bound either to do justice upon him, or avow himself the accomplice of his crimes.[g] But there is great dispute among the writers on the laws of nations, whether this exemption of ambassadors extends to all crimes, as well natural as positive; or whether it only extends to such as are *mala prohibita*, as coining, and not to those that are *mala in se*, as murder.[h] Our law seems to have formerly taken in the restriction, as well as the general exemption. For it has [254] been held, both by our common lawyers and civilians,[i] that an ambassador is privileged by the law of nature and nations; and yet, if he commits any offence against the law of reason and nature, he shall lose his privilege:[j] and that therefore, if an ambassador conspires the death of the king in whose land he is, he may be condemned and executed for treason; but if he commits any other species of treason, it is otherwise, and he must be sent to his own kingdom.[k] And these positions seem to be built upon good appearance of reason. For since, as we have formerly shown, all municipal laws act in subordination to the primary law of nature, and, where they annex a punishment to natural crimes, are only declaratory of and auxiliary to that law; therefore to this natural universal rule of justice ambassa-

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[e] 4 Inst. 152.

As to crimes.

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[f] As was done with count Gyllenberg the Swedish minister to Great Britain. *A. D.* 1716

[g] Sp. L. 26. 21.

[h] Van Leeuwen *in Ff.* 50. 7. 17. Barbeyrac's Puff. *l.* 8. *c.* 9. §. 9. & 17. Van Bynkershoek *de foro legator.* *c.* 17, 18, 19.

[i] 1 Roll. Rep. 175. 3 Bulstr. 27.

[j] 4 Inst. 153.

[k] 1 Roll. Rep. 185.

dors, as well as other men, are subject in all countries; and of consequence it is reasonable that, wherever they transgress it, there they shall be liable to make atonement.[l] But, however these principles might formerly obtain, the general practice of this country, as well as of the rest of Europe, seems now to pursue the sentiments of the learned Grotius, that the security of ambassadors is of more importance than the punishment of a particular crime.[m] And therefore few, if any, examples have happened within a century past, where an ambassador has been punished for any offence, however atrocious in its nature.

As to civil suits.

In respect to civil suits, all the foreign jurists agree, that neither an ambassador, nor any of his train or *comites*, can be prosecuted for any debt or contract in the courts of that kingdom wherein he is sent to reside. Yet Sir Edward Coke maintains, that, if an ambassador make a contract which is good *jure gentium*, he shall answer for it here.[n] But the truth is, so few cases (if any) had arisen, wherein the privilege was either claimed or disputed, even with regard to civil suits, that our law books are (in general) [255] quite silent upon it previous to the reign of queen Anne; when an ambassador from Peter the great, czar of Muscovy, was actually arrested and taken out of his coach in London,[o] for a debt of fifty pounds which he had there contracted. Instead of applying to be discharged upon his privilege, he gave bail to the action, and the next day complained to the queen. The persons who were concerned in the arrest were examined before the privy council (of which the lord chief justice Holt was at the same time sworn a member)[p] and seventeen were committed to prison:[q] most of whom were prosecuted by information in the court of queen's bench, at the suit of the attorney general,[r] and at their trial before the lord chief justice were convicted of the facts by the jury,[s] reserving the question of law, how far those facts were criminal, to be afterwards argued before the judges; which question was never determined. In the mean time the czar resented this affront very highly, and demanded that the sheriff of Middlesex and all others concerned in the arrest should be punished with instant death.[t] But the queen (to the amazement of that despotic court) directed her secretary to inform him, "that she could inflict no "punishment upon any, the meanest, of her subjects, unless "warranted by the law of the land: and therefore was "persuaded that he would not insist upon impossibilities."[u] To satisfy however the clamours of the foreign ministers (who made it a common cause) as well as to appease the wrath of Peter, a bill was brought into parliament,[v] and afterwards passed into a law,[w] to prevent and to punish such outrageous insolence for the future. And with a copy of this act, elegantly engrossed and illuminated, accompanied by a letter from the queen, an ambassador extraordinary[x] was commissioned to appear at Moscow,[y] who declared "that though her majesty could not inflict such a punish-"ment as was required, because of the defect in that [256] "particular of the former established constitutions of her "kingdom, yet, with the unanimous consent of the parlia-"ment she had caused a new act to be passed, to serve as a "law for the future." This humiliating step was accepted as a full satisfaction by the czar; and the offenders, at his request, were discharged from all further prosecution.

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[l] Foster's Reports, 188.

[m] *Securitas legatorum utilitati quæ ex pœna est præponderat.* (*de jure b & p.* 18. 4. 4.)

[n] 4 Inst. 153.

[o] 21 July 1708. Boyer's Annals of queen Anne.

[p] 25 July 1708. *Ibid.*

[q] 25, 29 July 1708. *Ibid.*

[r] 23 Oct. 1708. *Ibid.*

[s] 14 Feb. 1708. *Ibid.*

Stat. 7 Ann. c. 12.

This statute[z] recites the arrest which had been made, "in contempt of the protection granted by her majesty, "contrary to the law of nations, and in prejudice of the "rights and privileges, which ambassadors and other public "ministers have at all times been thereby possessed of, and "ought to be kept sacred and inviolable:" wherefore it enacts, that for the future all process whereby the person of any ambassador, or of his domestic or domestic servant may be arrested, or his goods distrained or seized, shall be utterly null and void; and the persons prosecuting, soliciting, or executing such process shall be deemed violators of the law of nations, and disturbers of the public repose; and shall suffer such penalties and corporal punishment as the lord chancellor and the two chief justices, or any two of them, shall think fit. But it is expressly provided, that no trader, within the description of the bankrupt laws, who shall be in the service of any ambassador, shall be privileged or protected by this act; nor shall any one be punished for arresting an ambassador's servant, unless his name be registered with the secretary of state, and by him transmitted to the sheriff of London and Middlesex. Exceptions that are strictly conformable to the rights of ambassadors,[a] as observed in the most civilized countries. And in consequence of this statute, thus declaring and enforcing the law of nations, but which has been repeatedly held to be declaratory only of the common law,[b] these privileges are now held [257] to be part of the law of the land, and are constantly allowed in the courts of common law.[c] But in order to be protected by the statute of Anne, a person must be *bonâ fide* an ambassador or one of his family, and not merely in his occasional employment.[d] And it has been determined that a consul is not included in its protection.[e]

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[t] 17 Sept. 1708. *Ibid.*

[u] 11 Jan. 1708. *Ibid.* Mod. Un. Hist. xxxv. 454.

[v] Com. Journ. 23 Dec. 1708.

[w] 21 Apr. 1709. Boyer, *ibid.* 7 Ann. c. 12.

[x] Mr. Whitworth.

[y] 8 Jan. 1709. Boyer, *ibid.*

[z] 7 Ann. c. 12.

2. The king makes treaties and leagues.

II. It is also the king's prerogative to make treaties, leagues, and alliances with foreign states and princes. For it is by the law of nations essential to the goodness of a league, that it be made by the sovereign power;[f] and then it is binding upon the whole community: and in England the sovereign power, *quoad hoc*, is vested in the person of the king. Whatever contracts therefore he engages in, no other power in the kingdom can legally delay, resist, or annul. And yet, lest this plenitude of authority should be abused to the detriment of the public, the constitution (as was hinted before) hath here interposed a check, by the means of parliamentary impeachment, for the punishment of such ministers as from criminal motives advise or conclude any treaty, which shall afterwards be judged to derogate from the honour and interest of the nation.

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[a] *Sæpe quæsitum est an comitum numero et jure habendi sunt, qui legatum comitantur, non ut instructior fiat legatio, sed unice ut lucro suo consulant, institores forte et mercatores. Et, quamvis hos sæpe defenderint et comitum loco habere voluerint legati, apparet tamen satis eo non pertinere, qui in legati legationisve officio non sunt. Quum autem ea res nonnunquam turbas dederit, optimo exemplo in quibusdam aulis olim receptum fuit, ut legatus teneretur exhibere nomenclaturam comitum suorum.* Van Bynkersh. c. 15. *prope finem.*

[b] Mr. Justice Coleridge's note.

[c] Fitzg. 200. Stra. 797.

[d] *Novello* v. *Toogood*, 1 B. & C. 554. *Lockwood* v. *Coysgarne*, 3 Burr. 1676. 1 Wils. 20.

[e] *Viveash* v. *Becker*, 3 M. & S. 284.

[f] Puff. L. of N. b. 8. c. 9. §. 6.

3. The king makes war and peace.

III. Upon the same principle the king has also the sole prerogative of making war and peace. For it is held by all the writers on the law of nature and nations, that the right of making war, which by nature subsisted in every individual, is given up by all private persons that enter into society, and is vested in the sovereign power:[g] and this right is given up, not only by individuals, but even by the entire body of people, that are under the dominion of a sovereign. It would indeed be extremely improper, that any number of subjects should have the power of binding the supreme magistrate, and putting him against his will in a state of war. Whatever hostilities therefore may be committed by private citizens, the state ought not to be affected thereby; unless that should justify their proceedings, and thereby become partner in the guilt. Such unauthorized volunteers in violence are not ranked among open enemies, but are treated like pirates and robbers: according to that rule of the civil law;[h] *hostes hi sunt qui nobis, aut quibus nos, publice bellum decrevimus: cæteri latrones aut prædones sunt.* And the reason which is given by Grotius,[i] why according to the law of nations a denunciation of war ought always to precede the actual commencement of hostilities, is not so much that the enemy may be put upon his guard, (which is matter rather of magnanimity than right) but that it may be certainly clear that the war is not undertaken by private persons, but by the will of the whole community; whose right of willing is in this case transferred to the supreme magistrate by the fundamental laws of society. So that, in order to make a war completely effectual, it is necessary with us in England that [258] it be publicly declared and duly proclaimed by the king's authority; and, then, all parts of both the contending nations, from the highest to the lowest, are bound by it. And wherever the right resides of beginning a national war, there also must reside the right of ending it, or the power of making peace. And the same check of parliamentary impeachment, for improper or inglorious conduct, in beginning, conducting, or concluding a national war, is in general sufficient to restrain the ministers of the crown from a wanton or injurious exertion of this great prerogative.

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[g] Puff. b. 8. c. 6. §. 8, and Barbeyr. *in loc.*

[h] *Ff.* 50. 16. 118.

[i] *de jure b. & p. l.* 3. *c.* 3. §. 11.

4. The king may grant letters of marque.

IV. But, as the delay of making war may sometimes be detrimental to individuals who have suffered by depredations from foreign potentates, our laws have in some respects armed the subject with powers to impel the prerogative; by directing the ministers of the crown to issue letters of marque and reprisal upon due demand: the prerogative of granting which is nearly related to, and plainly derived from, that other of making war; this being indeed only an incomplete state of hostilities, and generally ending in a formal denunciation of war. These letters are grantable by the law of nations,[j] whenever the subjects of one state are oppressed and injured by those of another; and justice is denied by that state to which the oppressor belongs. In this case letters of marque and reprisal (words used as synonimous; and signifying, the latter a taking in return, the former the passing the frontiers in order to such taking)[k] may be obtained, in order to seize the bodies or goods of the subjects of the offending state, until satisfaction be made, [259] wherever they happen to be found. And indeed this custom of reprisals seems dictated by nature herself; for which reason we find in the most ancient times very notable instances of it.[l] But here the necessity is obvious of calling in the sovereign power, to determine when reprisals may be made; else every private sufferer would be a judge in his own cause. In pursuance of which principle, it is with us declared by the statute 4 Hen. V. c. 7, that, if any subjects of the realm are oppressed in time of truce by any foreigners, the king will grant marque in due form, to all that feel themselves grieved. Which form is thus directed to be observed: the sufferer must first apply to the lord privy-seal, and he shall make out letters of request under the privy-seal; and, if, after such request of satisfaction made, the party required do not within convenient time make due satisfaction or restitution to the party grieved, the lord chancellor shall make him out letters of marque under the great seal; and by virtue of these he may attack and seize the property of the aggressor nation, without hazard of being condemned as a robber or pirate. But the modern practice is to empower the lord high admiral or the commissioners of the admiralty to grant commissions to the owners of armed ships or privateers, and the prizes captured are divided according to a contract entered into between the owners and the captain and crew of the ship. But the owners, before the commission is granted, are obliged to give security to the admiralty to make compensation for any violation of treaties between those powers with whom the nation is at peace,[m] and they must also give security that the ship shall not be employed in smuggling.[n]

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[j] *de jure b. & p. l.* 3. *c.* 2. § 4 & 5.

[k] Dufresne, tit. *Marca.*

[l] See the account given by Nestor, in the eleventh book of the Iliad, of the reprisals made by himself on the Epeian nation; from whom he took a multitude of cattle, as a satisfaction for a prize won at the Elian games by his father Neleus, and for debts due to many private subjects of the Pylian kingdom; out of which booty the king took three hundred head of cattle for his own demand, and the rest were equitably divided among the other creditors.

5. The king may grant safe-conducts.

V. Upon exactly the same reason stands the prerogative of granting safe-conducts, without which by the law of nations no member of one society has a right to intrude into another. And therefore Puffendorf very justly resolves,[o] that it is left in the power of all states, to take such measures about the admission of strangers, as they think convenient; those being ever excepted who are driven on the coasts by necessity, or by any cause that deserves pity or compassion. Great tenderness is shewn by our laws, not only to foreigners in distress, but with regard also to the admission of strangers who come spontaneously. For so long as their nation continues at peace with ours, and they themselves behave peaceably, they are under the king's protection; though [260] liable to be sent home whenever the king sees occasion. But no subject of a nation at war with us can, by the law of nations, come into the realm, nor can travel himself upon the high seas, or send his goods and merchandize from one place to another, without danger of being seized by our subjects, unless he has letters of safe-conduct; which by divers ancient statutes[p] must be granted under the king's great seal and enrolled in chancery, or else are of no effect: the king being supposed the best judge of such emergencies, as may deserve exception from the general law of arms. But passports under the king's sign-manual, or licences from his ambassadors abroad, are now more usually obtained, and are allowed to be of equal validity.

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[m] 29 Geo. II. c. 34. 19 Geo. III. c. 67.

[n] 24 Geo. III. c. 47.

[o] Law of N. and N. b. 3. c. 3. §. 9.

Privileges of foreign merchants.

Indeed the law of England, as a commercial country, pays a very particular regard to foreign merchants in innumerable instances. One I cannot omit to mention: that by *magna carta*[q] it is provided, that all merchants (unless publicly prohibited before-hand,) shall have safe-conduct to depart from, to come into, to tarry in, and to go through England, for the exercise of merchandize, without any unreasonable imposts, except in time of war: and, if a war breaks out between us and their country, they shall be attached (if in England) without harm of body or goods, till the king or his chief justiciary be informed how our merchants are treated in the land with which we are at war; and, if ours be secure in that land, they shall be secure in ours. This seems to have been a common rule of equity among all the northern nations; for we learn from Stiernhook,[r] that it was a maxim among the Goths and Swedes, "*quam legem exteri nobis posuere, eandem illis ponemus.*" But it is somewhat extraordinary, that it should have found a place in *magna carta*, a mere interior treaty between the king and his natural-born subjects: which occasions the learned Montesquieu to remark with a degree of admiration, [261] "that the English have made the protection of *foreign* "merchants one of the articles of their *national* liberty."[s] But indeed it well justifies another observation which he has made,[t] "that the English know better than any other "people upon earth, how to value at the same time these "three great advantages, religion, liberty, and commerce." Very different from the genius of the Roman people; who in their manners, their constitution, and even in their laws, treated commerce as a dishonorable employment, and prohibited the exercise thereof to persons of birth, or rank, or fortune:[u] and equally different from the bigotry of the canonists, who looked on trade as inconsistent with christianity,[v] and determined at the council of Melfi, under pope Urban II., *A. D.* 1090, that it was impossible with a safe conscience to exercise any traffic, or follow the profession of the law.[w]

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[p] 15 Hen. VI. c. 3. 18 Hen. VI. c. 8. 20 Hen. VI. c. 1.

[q] *c.* 30.

[r] *de jure Sueon. l.* 3. *c.* 4.

[s] Sp. L. 20. 13.

Alterations of the law as to aliens.

An act[x] has very recently been passed which places the law respecting *aliens* on a still more favourable footing than any one preceding. By this act the former Alien Act of 7 Geo. 4, c. 54, is repealed, and it directs all masters of vessels arriving from foreign parts to declare to the chief officer of the customs at the port of arrival whether there is any alien on board, (s. 1.) And every alien shall, after such arrival, present to such officer his passport, and make a declaration of his name and country, (s. 2). A register is to be kept of these declarations, and a certificate of the registration given to the alien, (s. 4). This certificate on leaving this country is to be delivered up to the chief officer of the customs of the port of departure, (s. 6). This is all that is now required from an alien on entering or departing from this realm, and even these easy regulations do not affect aliens who have been resident here three years, and have obtained a certificate thereof, (s. 11).

These are the principal prerogatives of the king respecting this nation's intercourse with foreign nations; in all of which he is considered as the delegate or representative of his people. But in domestic affairs he is considered in a great variety of characters, and from thence there arises an abundant number of other prerogatives.

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[t] Sp. L. 20. 6.

[u] *Nobiliores natalibus, et bonorum luce conspicuos, et patrimonio ditiores, perniciosum urbibus mercimonium exercere prohibemus.* C. 4. 63. 3.

[v] *Homo mercator vix aut nunquam potest Deo placere: et ideo nullus christianus debet esse mercator; aut si voluerit esse, projiciatur de ecclesia Dei. Decret.* 1. 88. 11.

[w] *Falsa sit pœnitentia* [*laici*] *cum penitus ab officio curiali vel negotiali non recedit, quæ sine peccatis agi ulla ratione non prævalet. Act. Concil. apud Baron. c.* 16.

[x] 6 Wm. IV. c. 11, an act for the registration of aliens.

II. The king's prerogatives in domestic concerns.

1. The power of rejecting bills in parliament. The king is not bound by acts unless named,

I. First, he is a constituent part of the supreme legislative power; and, as such, has the prerogative of rejecting such provisions in parliament, as he judges improper to be passed. The expediency of which constitution has before been evinced at large.[y] I shall only farther remark, that the king is not bound by any act of parliament, unless he be named therein by special and particular words. The most general words that can be devised ("any person or persons, "bodies politic, or corporate, *&c.*") affect not him in the [262] least, if they may tend to restrain or diminish any of his rights or interests.[z] For it would be of most mischievous consequence to the public, if the strength of the executive power were liable to be curtailed without its own express consent, by constructions and implications of the subject. Yet, where an act of parliament is expressly made for the preservation of public rights and the suppression of public wrongs, and does not interfere with the established rights of the crown, it is said to be binding as well upon the king as upon the subject:[a] and, likewise, the king may take the benefit of any particular act, though he be not especially named.[b]

2. The king is the generalissimo,

II. The king is considered, in the next place, as the generalissimo, or the first in military command, within the kingdom. The great end of society is to protect the weakness of individuals by the united strength of the community: and the principal use of government is to direct that united strength in the best and most effectual manner, to answer the end proposed. Monarchical government is allowed to be the fittest of any for this purpose: it follows therefore, from the very end of its institution, that in a monarchy the military power must be trusted in the hands of the prince.

and has the power of raising and regulating fleets and armies,

In this capacity therefore, of general of the kingdom, the king has the sole power of raising and regulating fleets and armies. Of the manner in which they are raised and regulated I shall speak more, when I come to consider the military state. We are now only to consider the prerogative of enlisting and of governing them: which indeed was disputed and claimed, contrary to all reason and precedent, by the long parliament of king Charles I.; but, upon the restoration of his son, was solemnly declared by the statute 13 Car. II. c. 6, to be in the king alone: for that the sole supreme government and command of the militia within all his majesty's realms and dominions, and of all forces by sea and land, and of all forts and places of strength, ever was and is the undoubted right of his majesty, and his royal predecessors, [263.] kings and queens of England; and that both or either house of parliament cannot, nor ought to, pretend to the same.

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[y] Ch. II. page 149.

[z] 11 Rep. 74.

[a] 11 Rep. 71.

[b] 7 Rep. 32.

and of erecting and manning all forts,

This statute, it is obvious to observe, extends not only to fleets and armies, but also to forts, and other places of strength, within the realm; the sole prerogative as well of erecting, as manning and governing of which, belongs to the king in his capacity of general of the kingdom:[c] and all lands were formerly subject to a tax, for building of castles wherever the king thought proper. This was one of the three things, from contributing to the performance of which no lands were exempted; and therefore called by our Saxon ancestors the *trinoda necessitas: sc. pontis reparatio, arcis constructio, et expeditio contra hostem.*[d] And this they were called upon to do so often, that, as sir Edward Coke from M. Paris assures us,[e] there were in the time of Henry II. 1115 castles subsisting in England. The inconveniences of which, when granted out to private subjects, the lordly barons of those times, were severely felt as well by that monarch as by the whole kingdom; for, as William of Newburgh remarks in the reign of king Stephen, "*erant in* "*Anglia quadammodo tot reges vel potius tyranni, quod* "*domini castellorum:*" but it was felt by none more sensibly than by two succeeding princes, king John and king Henry III. And therefore, the greatest part of them being demolished in the barons' wars, the kings of after-times have been very cautious of suffering them to be rebuilt in a fortified manner: and sir Edward Coke lays it down,[f] that no subject can build a castle, or house of strength imbattled, or other fortress defensible, without the license of the king; for the danger which might ensue, if every man at his pleasure might do it.

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[c] 2 Inst. 30.

[d] Cowel's Interpr. *tit. Castellorum* *Operatio.* Seld. *Jan. Angl.* 1. 42.

[e] 2 Inst. 31.

The power of appointing ports and havens,

[264] It is partly upon the same, and partly upon a fiscal foundation, to secure his marine revenue, that the king has the prerogative of appointing *ports* and *havens*, or such places only, for persons and merchandize to pass into and out of the realm, as he in his wisdom sees proper. By the feudal law all navigable rivers and havens were computed among the *regalia*,[g] and were subject to the sovereign of the state. And in England it hath always been holden, that the king is lord of the whole shore,[h] and particularly is the guardian of the ports and havens, which are the inlets and gates of the realm:[i] and therefore, so early as the reign of king John, we find ships seized by the king's officers for putting in at a place that was not a legal port.[j] These legal ports were undoubtedly at first assigned by the crown; since to each of them a court of portmote is incident,[k] the jurisdiction of which must flow from the royal authority: the *great ports* of the sea are also referred to, as well known and established, by statute 4 Hen. IV. c. 20, which prohibits the landing elsewhere under pain of confiscation: and the statute 1 Eliz. c. 11, recites, that the franchise of landing and discharging had been frequently granted by the crown.

But though the king had a power of granting the franchise of havens and ports, yet he had not the power of resumption, or of narrowing and confining their limits when once established; but any person had a right to load or discharge his merchandize in any part of the haven: whereby the revenue of the customs was much impaired and diminished, by fraudulent landings in obscure and private corners. This occasioned the statute of 1 Eliz. c. 11, and 13 & 14 Car. II. c. 11, s. 14, which enable the crown by commission to ascertain the limits of all ports, and to assign

and to ascertain their limits.

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[f] 1 Inst. 5.

[g] 2 *Feud. t.* 56. Crag. 1 15. 15.

[h] F. N. B. 113.

[i] Dav. 9. 56.

[j] Madox. Hist. Exch. 530.

[k] 4 Inst. 148.

proper wharfs and quays in each port, for the exclusive landing and loading of merchandize.

To erect beacons and light-houses.

The erection of beacons, light-houses, and sea-marks, is also a branch of the royal prerogative: whereof the first was anciently used in order to alarm the country, in case of the [265] approach of an enemy; and all of them are signally useful in guiding and preserving vessels at sea by night as well as by day. For this purpose the king hath the exclusive power, by commission under his great seal,[l] to cause them to be erected in fit and convenient places,[m] as well upon the lands of the subject as upon the demesnes of the crown: which power is usually vested by letters patent in the office of lord high admiral.[n] And by statute 8 Eliz. c. 13, the corporation of the trinity-house are empowered to set up any beacons or sea-marks wherever they shall think them necessary; and if the owner of the land or any other person shall destroy them, or shall take down any steeple, tree, or other known sea mark, he shall forfeit 100*l.*, or in case of inability to pay it, shall be *ipso facto* outlawed.

The power of prohibiting the exportation of arms.

To this branch of the prerogative may also be referred the power vested in his majesty, by statutes 12 Car. II. c. 4, 29 Geo. II. c. 16, and 6 Geo. IV. c. 107, of prohibiting the exportation of arms or ammunition out of this kingdom, under severe penalties. By the latter statute the exportation of arms and ammunition, military and naval stores, or any article (except copper) convertible into naval stores, may be prohibited by proclamation, or order in council. The same statute also prohibits the *importation* of arms, ammunition, and utensils of war, except by his majesty's license.

Foreign enlistment.

Further, by a recent statute,[o] any British subject may be punished by fine and imprisonment, who shall enlist or serve in any foreign service, military or naval, except by license of the crown. But this statute has never been strictly enforced. The king has likewise the right, whenever he sees proper, of confining his subjects to stay within the realm, or of recalling them when beyond the seas. By the

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[l] 3 Inst. 204. 4 Inst. 148.

[m] *Rot. Claus.* 1 *Ric. II. m.* 42 Pryn. on 4 Inst. 136.

[n] Sid. 158. 4 Inst. 149.

[o] 59 Geo. III. c. 69. Two former statutes, having the same object, 9 Geo. II. c. 30, and 29 Geo. II. c. 17, are repealed by this statute.

How far the king may confine his subjects within the realm.

common law,[p] every man may go out of the realm for whatever cause he pleaseth, without obtaining the king's leave; provided he is under no injunction of staying at home: (which liberty was expressly declared in king John's great charter, though left out in that of Henry III.) but, because that every man ought of right to defend the king and his realm, therefore the king at his pleasure may command him by his writ that he go not beyond the seas, or out of the realm, without license; and, if he do the contrary, he shall be punished for disobeying the king's command. Some persons there anciently were, that, by reason of their stations, were under a perpetual prohibition of going abroad without license obtained; among which were reckoned all [266] peers, on account of their being counsellors of the crown; all knights, who were bound to defend the kingdom from invasions: all ecclesiastics, who were expressly confined by the fourth chapter of the constitutions of Clarendon, on account of their attachment in the times of popery to the see of Rome; all archers and other artificers, lest they should instruct foreigners to rival us in their several trades and manufactures. This was law in the times of Britton,[q] who wrote in the reign of Edward I.: and sir Edward Coke[r] gives us many instances to this effect in the time of Edward III. In the succeeding reign the affair of travelling wore a very different aspect: an act of parliament being made,[s] forbidding all persons whatever to go abroad without license: *except* only the lords and other great men of the realm; and true and notable merchants; and the king's soldiers. But this act was repealed by the statute 4 Jac. I. c. 1. And at present every body has, or at least assumes, the liberty of going abroad when he pleases. Yet undoubtedly if the king, by writ of *ne exeat regno*, under his great seal or privy seal, thinks proper to prohibit him from so doing; or if the king sends a writ to any man, when abroad, commanding his return; and in either case the subject disobeys; it is a high contempt of the king's prerogative, for which the offender's lands shall be seized till he return; and then he is liable to fine and imprisonment.[t] The writ of *ne exeat regno* is also sometimes granted by courts of equity, for the furtherance of justice in civil suits, where on a case sufficiently clear, a party under some liability meditates flight, and as arrest on mesne process has recently been abolished[u] by the legislature, resort may be had more frequently to this mode of restraining a departure from the realm.

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[p] F. N. B. 85.

[q] c. 123.

[r] 3 Inst. 175.

[s] 5 Ric. II. c. 2.

3. The king is the fountain of justice,

III. Another capacity, in which the king is considered in domestic affairs, is as the fountain of justice and general conservator of the peace of the kingdom. By the fountain of justice the law does not mean the *author* or *original*, but only the *distributor*. Justice is not derived from the king, as from his *free gift*; but he is the steward of the public, to dispense it to whom it is *due*.[v] He is not the spring, but the reservoir; from whence right and equity are conducted, by a thousand channels, to every individual. The original power of judicature, by the fundamental principles of society, is lodged in the society at large: but as it would be impracticable [267] to render complete justice to every individual, by the people in their collective capacity, therefore every nation has committed that power to certain select magistrates, who with more ease and expedition can hear and determine complaints; and in England this authority has immemorially been exercised by the king or his substitutes. He therefore has alone the right of erecting courts of judicature: for though the constitution of the kingdom hath intrusted him with the whole executive power of the laws, it is impossible, as well as improper, that he should personally carry into execution this great and extensive trust: it is consequently necessary, that courts should be erected, to assist him in executing this power; and equally necessary, that, if erected, they should be erected by his authority. And hence it is, that all jurisdictions of courts are either mediately or immediately derived from the crown, their proceedings run generally in the king's name, they pass under his seal, and are executed by his officers.

and administers jus-

It is probable, and almost certain, that in very early times, tice through the judges who are now independent of the crown.

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[t] 1 Hawk. P. C. 22.

[u] 1 & 2 Vict. c. 110.

[v] *Ad hoc autem creatus est et electus, ut justitiam faciat universis.* Bract. *l.* 3. *tr.* 1. *c.* 9.

before our constitution arrived at its full perfection, our kings in person often heard and determined causes between party and party. But at present, by the long and uniform usage of many ages, our kings have delegated their whole judicial power to the judges of their several courts; which are the grand depositaries of the fundamental laws of the kingdom, and have gained a known and stated jurisdiction, regulated by certain and established rules, which the crown itself cannot now alter but by act of parliament.[w] And, in order to maintain both the dignity and independence of the judges in the superior courts, it is enacted by the statute 13 W. III. c. 2, that their commissions shall be made (not, as formerly, *durante bene placito*, but) *quamdiu bene se gesserint*, and their salaries ascertained and established; but that it may be lawful to remove them on the address of both houses of parliament. And now, by the noble improvements of that law in the statute of 1 Geo. III. c. 23, enacted at the [268] earnest recommendation of that king himself from the throne, the judges are continued in their offices during their good behaviour, notwithstanding any demise of the crown, (which was formerly held[x] immediately to vacate their seats) and their full salaries are absolutely secured to them during the continuance of their commissions; his majesty having been pleased to declare, that "he looked upon the independence "and uprightness of the judges, as essential to the impartial administration of justice; as one of the best securities "of the rights and liberties of his subjects; and as most "conducive to the honour of the crown."[y] And the salaries of the judges have been recently augmented by several acts of the legislature.[z]

In criminal proceedings the king is prosecutor.

In criminal proceedings, or prosecutions for offences, it would still be a higher absurdity, if the king personally sat in judgment; because in regard to these he appears in another capacity, that of *prosecutor*. All offences are either against the king's peace, or his crown and dignity: and are so laid in every indictment. For though in their consequences they generally seem (except in the case of treason and a very few others) to be rather offences against the kingdom than the king; yet, as the public, which is an invisible body, has delegated all its power and rights, with regard to the execution of the laws, to one visible magistrate, all affronts to that power, and breaches of those rights, are immediately offences against him, to whom they are so delegated by the public. He is therefore the proper person to prosecute for all public offences and breaches of the peace, being the person injured in the eye of the law. And this notion was carried so far in the old Gothic constitution, (wherein the king was bound by his coronation oath to conserve the peace) that in case of any forcible injury offered to the person of a fellow-subject, the offender was accused of a kind of perjury, in having violated the king's coronation oath; *dicebater fregisse juramentum regis juratum.*[a] And hence also arises another branch of the prerogative, that of [269] *pardoning* offences; for it is reasonable that he only who is injured should have the power of forgiving. Of prosecutions and pardons I need not treat more at large here; and only mention them, in this cursory manner, to shew the constitutional grounds of this power of the crown, and how regularly connected all the links are in this vast chain of prerogative.

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[w] 2 Hawk. P. C. 2.

[x] Lord Raym. 747.

[y] Com. Journ. 3 Mar. 1761.

[z] 49 Geo. III. c. 127. 6 Geo. IV c. 82, 83, & 84.

Advantages of the British mode of administering justice.

In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure, by the crown, consists one main preservative of the public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty, and property, of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an over-balance for the legislative. For which reason, by the statute of 16 Car. I. c. 10, which abolished the court of star-chamber, effectual care is taken to remove all judicial power out of the hands of the king's privy council; who, as then was evident from recent instances, might soon be inclined to pronounce that for law, which was most agreeable to the prince or his officers. Nothing therefore is more to be avoided, in a free constitution, than uniting the provinces of a judge and a minister of state. And indeed, that the absolute power, formerly claimed and exercised in a neighbouring nation, was more tolerable than that of the eastern empires, was in great measure owing to their having vested the judicial power in their parliaments, a body separate and distinct from both the legislative and executive: but that nation has now fully recovered its former liberty, which it owes to the efforts of its people. In Turkey, where every [270] thing is still centered in the sultan or his ministers, despotic power is in its meridian, and wears indeed a dreadful aspect.

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[a] Stiernh. *de jure Goth. l.* 3. *c.* 3. A notion somewhat similar to this may be found in the Mirror, c. 1. §. 5. And so also, when the chief justice Thorpe was condemned to be hanged for bribery, he was said *sacramentum domini regis fregisse. Rot. Parl.* 25 *Edw. III.*

The legal ubiquity of the king.

A consequence of this prerogative is the legal *ubiquity* of the king. His majesty, in the eye of the law, is always present in all his courts, though he cannot personally distribute justice.[b] His judges are the mirror by which the king's image is reflected. It is the regal office, and not the royal person, that is always present in court, always ready to undertake prosecutions, or pronounce judgment, for the benefit and protection of the subject. And from this ubiquity it follows, that the king can never be nonsuit;[c] for a nonsuit is the desertion of the suit or action by the non-appearance of the plaintiff in court; although as this rule might sometimes work unjustly, the attorney-general may enter a *non vult prosequi*, which has the effect of a nonsuit.[d] In the forms of legal proceedings also the king is not said to appear *by his attorney*, as other men do; for in contemplation of law he is always present in court.[e]

The king has the power of issuing proclamations.

From the same original, of the king's being the fountain of justice, we may also deduce the prerogative of issuing proclamations, which is vested in the king alone. These proclamations have then a binding force, when (as Sir Edward Coke observes)[f] they are grounded upon and enforce the laws of the realm. For, though the making of laws is entirely the work of a distinct part, the legislative branch, of the sovereign power, yet the manner, time, and circumstances of putting those laws in execution must frequently be left to the discretion of the executive magistrate. And therefore his constitutions or edicts concerning these points, which we call proclamations, are binding upon the subject, where they do not either contradict the old laws or tend to establish new ones; but only enforce the execution of such laws as are already in being, in such manner as the king shall judge necessary. Thus the established law is, that the king may prohibit any of his subjects from leaving the realm: a proclamation therefore forbidding this in general for three weeks, by laying an embargo upon all shipping in time of war,[g] [271] will be equally binding as an act of parliament, because founded upon a prior law. But a proclamation to lay an embargo in time of peace upon all vessels laden with wheat (though in the time of a public scarcity) being contrary to law, and particularly to statute 22 Car. II. c. 13, the advisers of such a proclamation and all persons acting under it, found it necessary to be indemnified by a special act of parliament, 7 Geo. III. c. 7. A proclamation for disarming papists is also binding, being only in execution of what the legislature has first ordained: but a proclamation for allowing arms to papists, or for disarming any protestant subjects, will not bind; because the first would be to assume a dispensing power, the latter a legislative one; to the vesting of either of which in any single person the laws of England are absolutely strangers. Indeed by the statute 31 Hen. VIII. c. 8, it was enacted, that the king's proclamations should have the force of acts of parliament: a statute, which was calculated to introduce the most despotic tyranny, and which must have proved fatal to the liberties of this kingdom, had it not been luckily repealed in the minority of his successor, about five years after.[h]

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[b] Fortesc. c. 8. 2 Inst. 186.

[c] Co. Litt. 139.

[d] Mr. Christian's note, Co. Litt. 139.

[e] Finch, L. 81.

4. The king is the fountain of honour,

IV. The king is likewise the fountain of honour, of office, and of privilege: and this in a different sense from that wherein he is styled the fountain of justice; for here he is really the parent of them. It is impossible that government can be maintained without a due subordination of rank; that the people may know and distinguish such as are set over them, in order to yield them their due respect and obedience; and also that the officers themselves, being encouraged by emulation and the hopes of superiority, may the better discharge their functions: and the law supposes, that no one can be so good a judge of their several merits and services, as the king himself who employs them. It has therefore intrusted with him the sole power of conferring dignities and honours, in confidence that he will bestow them upon none, but such as deserve them. And therefore [272] all degrees of nobility, of knighthood, and other titles, are received by immediate grant from the crown; either expressed in writing, by writs or letters patent, as in the creations of peers and baronets; or by corporeal investiture, as in the creation of a simple knight.

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[f] 3 Inst. 162.

[g] 4 Mod. 177. 179.

[h] Stat. 1 Edw. VI. c. 12. See also *ante*, p. 103, n. y.

and can thus erect and dispose of offices,

From the same principle also arises the prerogative of erecting and disposing of offices: for honours and offices are in their nature convertible and synonymous. All offices under the crown carry in the eye of the law an honour along with them; because they imply a superiority of parts and abilities, being supposed to be always filled with those that are most able to execute them. And, on the other hand, all honours in their original had duties or offices annexed to them; an earl, *comes*, was the conservator or governor of a county; and a knight, *miles*, was bound to attend the king in his wars. For the same reason therefore that honours are in the disposal of the king, offices ought to be so likewise; and as the king may create new titles, so may he create new offices: but with this restriction, that he cannot create new offices with new fees annexed to them, nor annex new fees to old offices; for this would be a tax upon the subject, which cannot be imposed but by act of parliament.[i] Wherefore, in 13 Hen. IV., a new office being created by the king's letters patent for measuring cloths, with a new fee for the same, the letters patent were, on account of the new fee, revoked and declared void in parliament.

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[i] 2 Inst. 533.

Upon the same, or a like reason, the king has also the prerogative of conferring privileges upon private persons. Such as granting place or precedence to any of his subjects, as shall seem good to his royal wisdom:[j] and according to the regulations of the statute passed respecting it:[k] or such as converting aliens, or persons born out of the king's dominions, into denizens; whereby some very considerable privileges of natural-born subjects are conferred upon them. Such also is the prerogative of erecting corporations; whereby a number of private persons are united and knit together, and enjoy many liberties, powers, and immunities in their politic capacity, which they were utterly incapable of in their natural. Of aliens, denizens, natural-born, and naturalized subjects, I shall speak more largely in a subsequent chapter; as also of corporations at the close of this volume. I now only mention them incidentally, in order to remark the king's prerogative of making them; which is grounded upon this foundation, that the king, having the sole administration of the government in his hands, is the best and the only judge, in what capacities, with what privileges, and under what distinctions, his people are the best qualified to serve, and to act under him. A principle, which was carried so far by the imperial law, that it was determined to be the crime of sacrilege, even to doubt whether the prince had appointed proper officers in the state.[l]

and confer privileges.

[273]

V. Another light, in which the laws of England consider the king with regard to domestic concerns, is as the arbiter of commerce. By commerce, I at present mean domestic commerce only. It would lead me into too large a field, if I were to attempt to enter upon the nature of foreign trade, its privileges, regulations, and restrictions; and would be also quite beside the purpose of this work, inasmuch as no municipal laws can be sufficient to order and determine the very extensive and complicated affairs of traffic and merchandize; neither can they have a proper authority for this purpose. For, as these are transactions carried on between subjects of independent states, the municipal laws of one

5. The king is the arbiter of commerce,

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[j] 4 Inst. 361.

[k] 31 Hen. VIII. c. 10.

[l] *Disputare de principali judicio non oportet; sacrilegii enim instar est, dubitare an is dignus sit, quem elegerit imperator.* C. 9. 29. 3.

will not be regarded by the other. For which reason the affairs of commerce are regulated by a law of their own, called the law merchant or *lex mercatoria,* which all nations agree in and take notice of. And in particular it is held to be part of the law of England, which decides the causes of merchants by the general rules which obtain in all commercial countries; and that often even in matters relating to domestic trade, as for instance with regard to the drawing, the acceptance, and the transfer, of inland bills of exchange.[m]

[274] With us in England, the king's prerogative, so far as it relates to mere domestic commerce, will fall principally under the following articles.

and thus the king establishes marts and fairs,

First, the establishment of public marts, or places of buying and selling, such as markets and fairs, with the tolls thereunto belonging. These can only be set up by virtue of the king's grant, or by long and immemorial usage and prescription, which pre-supposes such a grant.[n] The limitation of these public resorts, to such time and such place as may be most convenient for the neighbourhood, forms a part of economics, or domestic polity; which, considering the kingdom as a large family, and the king as the master of it, he clearly has a right to dispose and order as he pleases, subject, however, to all-existing rights.[o]

regulates weights and measures.

Secondly, the regulation of weights and measures. These, for the advantage of the public, ought to be universally the same throughout the kingdom; being the general criterions which reduce all things to the same or an equivalent value. But, as weight and measure are things in their nature arbitrary and uncertain, it is therefore expedient that they be reduced to some fixed rule or standard: which standard it is impossible to fix by any written law or oral proclamation; for no man can, by words only, give another an adequate idea of a foot-rule, or a pound-weight. It is therefore necessary to have recourse to some visible, palpable, material standard; by forming a comparison with which, all weights and measures may be reduced to one uniform size: and the prerogative of fixing this standard our ancient law vested in the crown, as in Normandy it belonged to the duke.[p] This standard was originally kept at Winchester: and we find in the laws of king Edgar,[q] near a century before the conquest, an injunction that the one measure, which was kept at Winchester, should be observed throughout the realm; and this Winchester standard was adopted and regulated by many subsequent statutes, down to the reign of George the fourth, when it was superseded, and a new attempt made to introduce a uniformity of weights and measures, which came into operation on the 1st of January 1826. Several statutes have since been passed for effecting this desirable object;[r] and by this the imperial standard yard, pound, gallon, and bushel, are fixed and are rendered uniform throughout the United Kingdom; and models and copies of these and their parts are deposited at the Chamberlain's Office, Westminster, and sent to London, Edinburgh, Dublin, and other places. But by the last act, weights and measures verified and stamped at the Exchequer at Westminster are declared legal, although not similar in shape to those required, (s. 4). And all local and customary measures, and also heaped measures are abolished, (s. 6 & 7).

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[m] Co. Litt. 172. Ld. Raym. 181. 1542.

[n] 2 Inst. 220.

[o] Mr. Justice Coleridge's note.

To settle the currency.

Thirdly, as money is the medium of commerce, it is the king's prerogative, as the arbiter of domestic commerce, to give it authority or make it current. Money is an universal medium, or common standard, by comparison with which the value of all merchandize may be ascertained: or it is a sign, which represents the respective values of all commodities. Metals are well calculated for this sign, because they are durable and are capable of many subdivisions: and a precious metal is still better calculated for this purpose, because it is the most portable. A metal is also the most proper for a common measure, because it can easily be reduced to the same standard in all nations: and every particular nation fixes on it its own impression, that the weight and standard (wherein consists the intrinsic value) may both be known by inspection only.

As the quantity of precious metals increases, that is, the more of them there is extracted from the mine, this universal medium or common sign will sink in value, and grow less precious. Above a thousand millions of bullion are calculated to have been imported into Europe from America within less than three centuries; and the quantity is daily increasing. The consequence is, that more money must [277] be given now for the same commodity than was given an hundred years ago. And, if any accident were to diminish the quantity of gold and silver, their value would proportionably rise. A horse, that was formerly worth ten pounds, is now perhaps worth twenty; and, by any failure of current specie, the price may be reduced to what it was. Yet is the horse in reality neither dearer nor cheaper at one time than another: for, if the metal which constitutes the coin was formerly twice as scarce as at present, the commodity was then as dear at half the price, as now it is at the whole.

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[p] *Gr. Coustum. c.* 16.

[q] *cap.* 8.

[r] 5 Geo. IV. c. 74. 6 Geo. IV. c. 12. 4 & 5 Wm. IV. c. 49. 5 & 6 Wm. IV. c. 63.

and coining money,

The coining of money is in all states the act of the sovereign power; for the reason just mentioned, that its value may be known on inspection. And with respect to coinage in general, there are three things to be considered therein; the materials, the impression, and the denomination.

and determining the materials.

With regard to the materials, sir Edward Coke lays it down,[s] that the money of England must either be of gold or silver: and none other was ever issued by the royal authority till 1672, when copper farthings and half-pence were coined by king Charles the second, and ordered by proclamation to be current in all payments, under the value of six-pence, and not otherwise. But this copper coin is not upon the same footing with the other in many respects, particularly with regard to the offence of counterfeiting it. And, as to the silver coin, it was enacted by a temporary statute 14 Geo. III. c. 42, that no tender of payment in silver money, exceeding twenty-five pounds at one time, should be a sufficient tender in law, for more than its value by weight, at the rate of *5s. 2d.* an ounce. But now by the 56 Geo. III. c. 68, gold is made the only legal tender for payments within the United Kingdom exceeding *40s.*

The impressions.

As to the impression, the stamping thereof is the unquestionable prerogative of the crown: for, though divers bishops and monasteries had formerly the privilege of coining money, yet, as sir Matthew Hale observes,[z] this was usually done by special grant from the king, or by prescription which supposes one; and therefore was derived from, and not in derogation of, the royal prerogative. [278] Besides that they had only the profit of the coinage, and not the power of instituting either the impression or denomination; but had usually the stamp sent them from the exchequer. Until very recently the offence of counterfeiting the coin of the realm was punishable with death, but this punishment, in accordance with the general mitigation of our penal code, has recently been changed to transportation.[a]

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[s] 2 Inst. 577.

The denomination, or the value for which the coin is to pass current, is likewise in the breast of the king; and, if **The denomination.** any unusual pieces are coined, that value must be ascertained by proclamation. In order to fix the value, the weight and the fineness of the metal are to be taken into consideration together. When a given weight of gold or silver is of a given fineness, it is then of the true standard,[b] and called esterling or sterling metal; a name for which there are various reasons given,[c] but none of them entirely satisfactory. And of this sterling or esterling metal all the coin of the kingdom must be made, by the statute 25 Edw. III. c. 13. So that the king's prerogative seemeth not to extend to the debasing or enhancing the value of the coin, below or above the sterling value:[d] though sir Matthew Hale[e] appears to be of another opinion. The king may also, by his proclamation, legitimate foreign coin, and make it current here; declaring at what value it shall be taken in payment.[f] But this, I apprehend, ought to be by comparison with the standard of our own coin; otherwise the consent of parliament will be necessary. There is at present no such legitimated money; Portugal coin being [279] only current by private consent, so that any one who pleases may refuse to take it in payment. The king may also at any time decry, or cry down, any coin of the kingdom, and make it no longer current.[g]

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[z] 1 Hist. P. C. 191.

[a] 2 Wm. IV. c. 24.

[b] This standard hath been frequently varied in former times; but was for many years past thus settled. The pound troy of gold, consisting, since the 18 Hen. 8, of twenty-two carats (or twenty fourth parts) fine, and two of alloy, was divided into forty-four guineas and an half of the present value of 21*s.* each. But since 1816 the pound troy of standard gold has been coined into 46$\frac{87}{120}$ sovereigns, or 46*l.* 14*s.* 6*d.* And the pound troy of silver, consisting of eleven ounces and two pennyweights pure, and eighteen pennyweights alloy, was divided into sixty-two shillings. (*See Folkes on English coins.*) But since 1816 the pound troy of silver has been coined into sixty-six shillings. *Macculloch's Dict. Com.* 313.

[c] Spelm. Gloss. 203. Dufresne, III. 165. The most plausible opinion seems to be that adopted by those two etymologists, that the name was derived from the *Esterlingi*, or Easterlings; as those Saxons were anciently called, who inhabited that district of Germany now occupied by the Hanse-towns and their appendages; the earliest traders in modern Europe.

[d] 2 Inst. 577.

[e] 1 Hal. P. C. 194.

6. The king is the head of the church,

VI. The king is, lastly, considered by the laws of England as the head and supreme governor of the national church.

To enter into the reasons upon which this prerogative is founded is matter rather of divinity than of law. I shall therefore only observe that by statute 26 Hen. VIII. c. 1, (reciting that the king's majesty justly and rightfully is and ought to be the supreme head of the church of England; and so had been recognized by the clergy of this kingdom in their convocation) it is enacted, that the king shall be reputed the only supreme head in earth of the church of England, and shall have, annexed to the imperial crown of this realm, as well the title and style thereof, as all jurisdictions, authorities, and commodities, to the said dignity of supreme head of the church appertaining. And another statute to the same purport was made, 1 Eliz. c. 1.

and thus convenes, regulates, and dissolves all synods and convocations.

In virtue of this authority the king convenes, prorogues, restrains, regulates, and dissolves all ecclesiastical synods or convocations. This was an inherent prerogative of the crown, long before the time of Hen. VIII., as appears by the statute 8 Hen. VI. c. 1, and the many authors, both lawyers and historians, vouched by sir Edward Coke.[h] So that the statute 25 Hen. VIII. c. 19, which restrains the convocation from making or putting in execution any canons repugnant to the king's prerogative, or the laws, customs, and statutes of the realm, was merely declaratory of the old common law:[i] that part of it only being new, which makes the king's royal assent actually necessary to the validity of every canon. The convocation or ecclesiastical synod, in England, differs considerably in its constitution from the synods of other christian kingdoms: those consisting wholly of bishops; whereas with us the convocation is the miniature of a parliament, wherein the archbishop presides with regal state; the upper house of bishops represents the house of lords; and the lower house, composed of representatives of the several dioceses at large, and of each particular chapter therein, resembles the house of commons with its knights of the shire and burgesses.[j] This constitution is said to be owing to the policy of Edward I.: who thereby at one and the same time let in the inferior clergy to the privileges of forming ecclesiastical canons, (which before they had not) and also introduced a method of taxing ecclesiastical benefices, by consent of convocation.[k] But this convocation has of late years only met by way of form.[l] [280]

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[f] 1 Hal. P. C. 197.

[g] *Ibid.* 197.

[h] 4 Inst. 322, 323.

[i] 12 Rep. 72.

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[j] In the diet of Sweden, where the ecclesiastics form one of the branches of the legislature, the chamber of the clergy resembles the convocation of England. It is composed of the bishops and superintendants; and also of deputies, one of which is chosen by every ten parishes or rural deanery. *Mod. Un. Hist.* xxxiii. 18.

[k] Gilb. Hist. of Exch. c. 4.

[l] The convocation is still summoned with every new parliament, and this is done in the following mode. The king's writ is directed to the archbishop of each province, requiring him to summon all bishops, deans, archdeacons, cathedral and collegiate churches, &c.; upon which the archbishop directs his mandate to his dean provincial, first citing him peremptorily, then willing him in like manner to cite all the bishops, deans, &c., and all the clergy of his province; but directing, at the same time, that one proctor sent from each cathedral and collegiate church, and two from the body of the inferior clergy of each diocese, may suffice. The upper house in the province of Canterbury consists of the bishops of the province, with the archbishop as president, who prorogues and dissolves the convocation by mandate from the crown. The lower house consists (at least before the late alterations in the dioceses, and we are not aware that any change has been made by them,) of twenty-two deans, fifty-four archdeacons, twenty-four proctors from the chapters, and forty-four proctors representing the parochial clergy.

Each house has a prolocutor, chosen from among themselves. All members of both houses possess the same privilege of freedom from arrest as members of parliament, by 8th of Henry VI. In the province of York the convocation consists only of one house; and each archdeaconry elects two proctors.—*Church of England Quarterly Review* for Jan. 1839. I believe the practice is, on the first meeting of the convocation, to adjourn until the arrival of the speech from the throne, which in fact, of late years, never arrives, as the convocation has never met for the dispatch of business since the time of queen Anne. A.D. 1717.

Nominates to vacant bishopricks,

From this prerogative also, of being the head of the church, arises the king's right of nomination to vacant bishopricks, and certain other ecclesiastical preferments; which will more properly be considered when we come to treat of the clergy. I shall only here observe, that this is now done in consequence of the statute 25 Hen. VIII. c. 20.

and is the *dernier resort* in all ecclesiastical causes.

As head of the church, the king is likewise the *dernier resort* in all ecclesiastical causes; an appeal lying ultimately to him in chancery from the sentence of every ecclesiastical judge: which right was restored to the crown by statute 25 Hen. VIII. c. 19, and vested in the court of delegates. But this court has been recently abolished, and the jurisdiction is transferred to the judicial committee of the privy council, of which we have already given some account.[m]

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[m] See *ante*, p. 243.

CHAPTER THE EIGHTH.

OF THE KING'S REVENUE.

HAVING in the preceding chapter, considered at large [281] those branches of the king's prerogative, which contribute to his royal dignity, and constitute the executive power of the government, we proceed now to examine the king's *fiscal* prerogatives, or such as regard his *revenue;* which the British constitution hath vested in the royal person, in order to support his dignity and maintain his power: being a portion which each subject contributes of his property, in order to secure the remainder.

The king's revenue

This revenue is either ordinary, or extraordinary. The king's ordinary revenue is such, as has either subsisted time out of mind in the crown; or else has been granted by parliament, by way of purchase or exchange for such of the king's inherent hereditary revenues, as were found inconvenient to the subject.

is either ordinary or extraordinary. The ordinary revenue, what it is.

When I say that it has subsisted time out of mind in the crown, I do not mean that the king is at present in the actual possession of the whole of this revenue. Much (nay, the greatest part) of it is at this day in the hands of subjects; to whom it has been granted out from time to time by the kings of England: which has rendered the crown in some measure dependent on the people for its ordinary support and subsistence. So that I must be obliged to recount, as part of the royal revenue, what lords of manors and other subjects frequently look upon to be their own absolute inherent rights; because they are and have been vested in them and their ancestors for ages, though in reality originally derived from the grants of our ancient princes.

It consists of

[282] I. The first of the king's ordinary revenues, which I shall take notice of, is of an ecclesiastical kind; (as are also the three succeeding ones) viz. the custody of the temporalities of bishops: by which are meant all the lay revenues, lands, and tenements, (in which is included his barony) which belong to an archbishop's or bishop's see. And these upon the vacancy of the bishoprick are immediately the right of the king, as a consequence of his prerogative in church matters; whereby he is considered as the founder of all archbishopricks and bishopricks, to whom during the vacancy they revert. And for the same reason, before the dissolution of abbeys, the king had the custody of the temporalities of all such abbeys and priories as were of royal foundation (but not of those founded by subjects) on the death of the abbot or prior.[a] Another reason may also be given, why the policy of the law hath vested this custody in the king; because as the successor is not known, the lands and possessions of the see would be liable to spoil and devastation, if no one had a property therein. Therefore the law has given the king, not the temporalities themselves, but the *custody* of the temporalities, till such time as a successor is appointed; with power of taking to himself all the intermediate profits, without any account of the successor; and with the right of presenting (which the crown very frequently exercises) to such benefices and other preferments as fall within the time of vacation.[b] This revenue is of so high a nature, that it could not be granted out to a subject, before, or even after, it accrued; but now by the statute 15 Edw. III. st. 4, c. 4 and 5, the king may, after the vacancy, lease the temporalities to the dean and chapter; saving to himself all advowsons, escheats, and the like. Our ancient kings, and particularly William Rufus, were not only remarkable for keeping the bishopricks a long time vacant, for the sake of enjoying the temporalities, but also committed horrible waste on the woods and other parts of the estate; and to crown all, would never, when the see was filled up, restore to the bishop his temporalities again unless he purchased them at [283] an exorbitant price. To remedy which, king Henry the

The custody of the bishops' temporalities.

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[a] 2 Inst. 15.

[b] Stat. 17 Edw. II. c. 14. F. N. B. 32.

first[c] granted a charter at the beginning of his reign, promising neither to sell, nor let to farm, nor take any thing from, the domains of the church, till the successor was installed. And it was made one of the articles of the great charter,[d] that no waste should be committed in the temporalities of bishopsricks, neither should the custody of them be sold. The same is ordained by the statute of Westminster the first;[e] and the statute 14 Edw. III. st. 4, c. 4, (which permits, as we have seen, a lease to the dean and chapter) is still more explicit in prohibiting the other exactions. It was also a frequent abuse, that the king would for trifling, or no causes, seize the temporalities of bishops, even during their lives, into his own hands: but this is guarded against by statute 1 Edw. III. st. 2, c. 2.

This revenue of the king, which was formerly very considerable, is now by a customary indulgence almost reduced to nothing: for, at present, as soon as the new bishop is consecrated and confirmed, he usually receives the restitution of his temporalities quite entire, and untouched, from the king; and at the same time does homage to his sovereign: and then, and not sooner, he has a fee simple in his bishoprick, and may maintain an action for the profits.[f]

II. Corodies.

II. The king is entitled to a corody, as the law calls it, out of every bishoprick, that is, to send one of his chaplains to be maintained by the bishop, or to have a pension allowed him till the bishop promotes him to a benefice.[g] This is also in the nature of an acknowledgment to the king, as founder of the see, since he had formerly the same corody or pension from every abbey or priory of royal foundation. It is, I apprehend, now fallen into total disuse; though sir Matthew Hale says,[h] that it is due of common right, and that no prescription will discharge it.

III. The tithes of extra-parochial places.

III. The king also (as was formerly observed)[i] is entitled to all the tithes arising in extra-parochial places:[j] and since tithes have been commuted to the rent-charge payable in lieu thereof;[k] though perhaps it may be doubted how far

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[c] Matt. Paris.

[d] 9 Hen. III. c. 5.

[e] 3 Edw. I. c. 21.

[f] Co Litt. 67, 341.

[g] F. N. B. 230.

[h] Notes on F. N. B. above cited.

[i] Page 109.

[j] 2 Inst. 647.

[k] 6 & 7 W. 4, c. 71, s. 13.

this article, as well as the last, can be properly reckoned a part of the king's own royal revenue; since a corody supports only his chaplains, and these extra-parochial tithes are held under an implied trust, that the king will distribute them for the good of the clergy in general.

IV. First fruits and tenths.

IV. The next branch consists in the first-fruits, and tenths of all spiritual preferments in the kingdom; both of which I shall consider together.

These were originally a part of the papal usurpations over the clergy of this kingdom; first introduced by Pandulph the pope's legate, during the reigns of king John and Henry the third, in the see of Norwich; and afterwards attempted to be made universal by the popes Clement V. and John XXII. about the beginning of the fourteenth century. The first-fruits *primitiæ*, or *annates*, were the first year's whole profits of the spiritual preferment, according to a rate or *valor* made under the direction of pope Innocent IV. by Walter bishop of Norwich in 38 Hen. III., and afterwards advanced in value by commission from pope Nicholas IV. *A. D.* 1292, 20 Edw. I.;[l] which valuation of pope Nicholas is still preserved in the exchequer.[m] The tenths, or *decimæ*, were the tenth part of the annual profit of each living by the same valuation; which was also claimed by the holy see, under no better pretence than a strange misapplication of that precept of the Levitical law, which directs,[n] that the Levites "should offer a tenth part of their tithes as a heave-"offering to the Lord, and give it to Aaron the *high* priest." But this claim of the pope met with a vigorous resistance from the English parliament; and a variety of acts were passed to prevent and restrain it, particularly the statute 6 Hen. IV. c. 1, which calls it a horrible mischief and damnable custom. But the popish clergy, blindly devoted to the will of a foreign master, still kept it on foot; sometimes more secretly, sometimes more openly and avowedly: so that in the reign of Henry VIII., it was computed, that [285] in the compass of fifty years 800,000 ducats had been sent to Rome for first-fruits only. And, as the clergy expressed this willingness to contribute so much of their income to the head of the church, it was thought proper (when in the same reign the papal power was abolished, and the king was declared the head of the church of England) to annex this revenue to the crown; which was done by statute 26 Hen. VIII. c. 3, (confirmed by statute 1 Eliz. c. 4,) and a new *valor beneficiorum* was then made, by which the clergy are at present rated.

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[l] F. N. B. 176.

[m] 3 Inst. 154.

[n] Numb. xviii. 26.

Annexed to the crown, 26 Hen. VIII.

By these last mentioned statutes all vicarages under ten pounds a-year, and all rectories under ten marks, are discharged from the payment of first-fruits: and if, in such livings as continue chargeable with this payment, the incumbent lives but half a-year, he shall pay only one quarter of his first-fruits; if but one whole year, then half of them; if a year and a half, three quarters; and if two years, then the whole; and not otherwise. Likewise by the statute 27 Hen. VIII. c. 8, no tenths are to be paid for the first year, for then the first-fruits are due: and by other statutes of queen Anne, in the fifth and sixth years of her reign, if a benefice be under fifty pounds *per annum* clear yearly value, it shall be discharged of the payment of first-fruits and tenths.

What livings are discharged from payment of first fruits.

Some bishopricks and a considerable number of benefices have also been discharged. By royal grants under the 1 Eliz. c. 19, s. 2, the archbishop of Canterbury and the bishop of London were not only exempted from tenths, but authorized to receive the tenths of a certain number of benefices within their respective dioceses, in compensation for certain manors and estates which at the same time were alienated from their sees: the dean and canons of Windsor are also exempted, so that although there are two archbishopricks, and twenty-three bishopricks now liable to first-fruits, there are only eighteen bishopricks liable to tenths, and out of 10,498 benefices, with or without cure of souls, there are only 4898 which remain liable to tenths, and of that number 4500 are also liable to first-fruits.[o]

By the statute of Hen. VIII., however, the richer clergy, being, by the criminal bigotry of their popish predecessors, subjected at first to a foreign exaction, were afterwards, when that yoke was shaken off, liable to a like misapplication of their revenues, through the rapacious disposition of the then reigning monarch: till at length the piety of queen Anne re-

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[o] Report of Select Committee on First-fruits. Sess. 1837.

Queen Anne restored the tenths and first-fruits to the church for the augmentation of small livings.

stored to the church what had been thus indirectly taken from it. This she did, not by remitting the tenths and first-fruits entirely; but in a spirit of the truest equity, by applying these superfluities of the larger benefices to make up the deficiences of the smaller. And to this end she granted her royal charter, which was confirmed by the statute 2 Ann. c. 11, whereby all the revenue of first-fruits and tenths is vested in trustees for ever, to form a perpetual fund for the augmentation of poor livings. This is usually called queen Anne's bounty; which has been still farther regulated by subsequent statutes.[p]

Actual amount of the bounty.

It is however much to be regretted that this excellent fund is at present so inconsiderable. The actual revenue of the bounty has averaged for many years only 14,000*l.* This small amount is owing to the first-fruits and tenths being estimated according to the valuation made in the time of Hen. VIII. already mentioned, and not according to the present value.[q] It is certainly to be wished that means could be devised for placing this fund on the footing originally intended, and attempts have been repeatedly made in parliament, with that object in view which, having at last been favourably received, there is good reason to hope will ultimately be successful.[r]

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V. The rents and profits of the demesne lands.

V. The next branch of the king's ordinary revenue (which as well as the subsequent branches, is of a lay or temporal nature) consists in the rents and profits of the demesne lands of the crown. These demesne lands, *terræ dominicales regis*, being either the share reserved to the crown at the original distribution of landed property, or such as came to it afterwards by forfeitures or other means, were anciently very large and extensive; comprising divers manors, honors, and lordships; the tenants of which had very peculiar privileges. At present they are contracted within a very narrow compass, having been almost entirely granted away to private subjects. This has occasioned the parliament frequently to interpose; and, particularly, after king William III. had greatly impoverished the crown, an act passed,[s] whereby all future grants or leases from the crown for any longer term than thirty-one years or three lives are declared to be void; except with regard to houses, which may be granted for fifty years, and building leases, which may be granted for ninety-nine years.[t]

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[p] 5 Ann. c. 24. 6 Ann. c. 27. 1 Geo. I. st. 2, c. 12. 3 Geo. I. c. 10. And by a very recent statute, 1 Vict. c. 20, the offices of first-fruits, tenths, and queen Anne's bounty, are consolidated and regulated.

[q] Report of Select Committee, 1837.

[r] See Hansard's Parl. Deb. 1808 & 1810. See also the debates on this subject in the last session, the result of which was favourable to the increase of the fund. *Hansard's Deb.* 1838. vol. 42, p. 997.

And by the statute 26 Geo. III. c. 87, commissioners are appointed for examining and inquiring into the state, produce and expenditure of the rents of the lands, and fines for leases of the same, and into the state and value of all the lordships, forests, demesne and other lands, derelict and waste lands within the survey of his majesty's exchequer, and appertaining to the crown of Great Britain in England and Wales, and into all subsisting leases. This statute has been amended by several other statutes, 48 Geo. III. c. 73; 50 Geo. III. c. 50; 1 and 2 Geo. IV. c. 52, and 1 and 2 Vict. cc. 92, 93, and 101, and the effect of these statutes is to place the whole of the crown lands under the management of the commissioners of woods and forests. The income of the crown lands amounted to 170,000*l.* for the year ending January the 5th, 1839.

VI. The profits of military tenures.

Purveyance and pre-emption,

The forcible impressing carriages and horses.

[287] VI. Hither might have been referred the advantages which used to arise to the king from the profits of his military tenures, to which most lands in the kingdom were subject, till the statute 12 Car. II. c. 24, which in great measure abolished them all. Hither also might have been referred the profitable prerogative of purveyance and pre-emption: which was a right enjoyed by the crown of buying up provisions and other necessaries, by the intervention of the king's purveyors, for the use of his royal household, at an appraised valuation, in preference to all others, and even without consent of the owner: and also of forcibly impressing the carriages and horses of the subject, to do the king's business on the public roads, in the conveyance of timber, baggage, and the like, however inconvenient to the proprietor, upon paying him a settled price. A prerogative, [288] which prevailed pretty generally throughout Europe, during the scarcity of gold and silver, and the high valuation of money consequential thereupon. In those early times the

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[s] 1 Ann. st. 1, c. 7.

[t] 34 Geo. III. c. 75. 48 Geo. III. c. 73.

king's household (as well as those of inferior lords) were supported by specific renders of corn, and other victuals, from the tenants of the respective demesnes; and there was also a continual market kept at the palace gate to furnish viands for the royal use.[u] And this answered all purposes, in those ages of simplicity, so long as the king's court continued in a certain place. But when it removed from one part of the kingdom to another (as was formerly very frequently done) it was found necessary to send purveyors beforehand to get together a sufficient quantity of provisions and other necessaries for the household: and, lest the unusual demand should raise them to an exorbitant price, the powers before mentioned were vested in these purveyors: who in process of time very greatly abused their authority, and became a great oppression to the subject, though of little advantage to the crown; ready money in open market (when the royal residence was more permanent, and specie began to be plenty) being found upon experience to be the best proveditor of any. Wherefore by degrees the powers of purveyance have declined, in foreign countries as well as our own: and particularly were abolished in Sweden by Gustavus Adolphus, towards the beginning of the last century.[v] And, with us in England, having fallen into disuse during the suspension of monarchy, king Charles the second at his restoration consented, by the same statute, to resign entirely these branches of his revenue and power: and the parliament, in part of recompense, settled on him, his heirs and successors for ever, the hereditary excise of fifteen pence *per* barrel on all beer and ale sold in the kingdom, and a proportionable sum for certain other liquors. So that this hereditary excise, the nature of which shall be farther explained in the subsequent part of this chapter, now forms the sixth branch of his majesty's ordinary revenue.

All these resigned by Charles II., and an hereditary excise granted to him,

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VII. Wine licenses

VII. A seventh branch might also be computed to have arisen from wine licenses; or the rents payable to the crown by such persons as are licensed to sell wine by retail throughout England, except in a few privileged places. These were first settled on the crown by the statute 12 Car. II. c. 25, and, together with the hereditary excise, made up the equivalent in value for the loss sustained by the prerogative in the abolition of the military tenures, and the right of pre-emption and purveyance: but this revenue was abolished by the statute 30 Geo. II. c. 19, and an annual sum of upwards of 7000*l. per annum*, issuing out of the new stamp duties imposed on wine licenses, was settled on the crown in its stead.

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[u] 4 Inst. 273.

[v] Mod. Un. Hist. xxxiii. 220.

abolished by 30 Geo. 2, c. 19, in consideration of 7000*l.* per annum.

VIII. An eighth branch of the king's ordinary revenue is usually reckoned to consist in the profits arising from his forests. Forests are waste grounds belonging to the king, replenished with all manner of beasts of chase or venary; which are under the king's protection, for the sake of his royal recreation and delight: and, to that end, and for preservation of the king's game, there are particular laws, privileges, courts, and officers belonging to the king's forests. The profits arising to the king from hence, consists principally in amercements or fines levied for offences against the forest-laws. But as few, if any, courts of this kind for levying amercements [w] have been held since 1632, 8 Car. I. and as, from the accounts given of the proceedings in that court by our histories and law books,[x] no body would now wish to see them again revived, it is needless to pursue this inquiry any farther.

VIII. Profits arising from forests.

IX. The profits arising from the king's ordinary courts of justice make a ninth branch of his revenue. And these consist not only in fines imposed upon offenders, forfeitures of recognizances, and amercements levied upon defaulters; [290] but also in certain fees due to the crown in a variety of legal matters, as, for setting the great seal to charters, original writs, and other forensic proceedings, and formerly, for permitting fines to be levied of lands in order to bar entails, or otherwise to insure their title, but fines as a mode of assurance are now abolished.[y] As none of these can be

IX. The profits arising from the courts of justice.

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[w] Roger North, in his life of lord keeper North, (43, 44.) mentions an eyre, or *iter*, to have been held south of Trent soon after the Restoration; but I have met with no report of its proceedings.

[x] 1 Jones. 267—298.

[y] 3 & 4 Wm. IV. c. 74. By the stat. 3 & 4 Wm. IV. c. 99, s. 29, an account of fines, penalties, recognizances, and deodands, is to be transmitted to the treasury and to the commissioners of audit, and other provisions are made for their more speedy return and recovery.

done without the immediate intervention of the king, by himself or his officers, the law allows him certain perquisites and profits, as a recompence for the trouble he undertakes for the public. These, in process of time, have been almost all granted out to private persons, or else appropriated to certain particular uses; so that, though our law proceedings are still in some degree loaded with their payment, very little of them is now or has been recently returned into the king's exchequer; for a part of whose royal maintenance they were originally intended. All future grants of them, however, by the statute 1 Ann. st. 2, c. 7, are to endure for no longer time than the prince's life who grants them, and it has been the good policy of the legislature of late years to abolish all unnecessary fees payable in courts of justice, and in all judicial proceedings.[z]

X. Royal fish.

X. A tenth branch of the king's ordinary revenue, said to be grounded on the consideration of his guarding and protecting the seas from pirates and robbers, is the right to *royal fish*, which are whale and sturgeon: and these, when either thrown ashore, or caught near the coasts, are the property of the king, on account[a] of their superior excellence. Indeed our ancestors seem to have entertained a very high notion of the importance of this right; it being the prerogative of the kings of Denmark and the dukes of Normandy;[b] and from one of these it was probably derived to our princes. It is expressly claimed and allowed in the statute *de prærogativa regis*:[c] and the most ancient treatises of law now extant make mention of it;[d] though they seem to have made a distinction between whale and sturgeon, as was incidentally observed in a former chapter.[e]

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[z] Various sinecure offices connected with our courts of justice have been abolished by several recent statutes. See 11 Geo. IV., and 1 W. IV. c. 58. 2 & 3 W. IV. c. 111. 3 & 4 W. IV. c. 94. 4 & 5 W. IV. c. 24; and more especially the statute 1 Vict. c. 30. The unnecessary expenses of the suitor have thus been much and very properly diminished.

[a] Plowd. 315.

[b] Stiernh. *de jure Sueonum. l.* 2. *c.* 8. *Gr. Coustum. cap.* 17.

[c] 17 Edw. II. *c.* 11.

[d] Bracton. *l.* 3. *c.* 3. Britton, *c.* 17. Fleta. *l.* 1. *c.* 45 & 46. *Memorand. Scacch'. H.* 24 *Edw.* I. 37, prefixed to Maynard's year book of Edward II.

[e] Ch. 4. page 232.

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XI. Shipwrecks.

XI. Another maritime revenue, and founded partly upon the same reason, is that of shipwrecks: which are also declared to be the king's property by the same prerogative statute 17 Edw. II. c. 2, and were so, long before, at the common law. It is worthy observation, how greatly the law of wrecks has been altered, and the rigour of it gradually softened in favour of the distressed proprietors. Wreck, by the ancient common law, was where any ship was lost at sea, and the goods or cargo were thrown upon the land; in which case these goods, so wrecked, were adjudged to belong to the king: for it was held, that, by the loss of the ship, all property was gone out of the original owner.[f] But this was undoubtedly adding sorrow to sorrow, and was consonant neither to reason nor humanity. Wherefore it was first ordained by king Henry I., that if any person escaped alive out of the ship it should be no wreck;[g] and afterwards king Henry II., by his charter,[h] declared, that if on the coasts of either England, Poictou, Oleron, or Gascony, any ship should be distressed, and either man or beast should escape or be found therein alive, the goods should remain to the owners, if they claimed them within three months; but otherwise should be esteemed a wreck, and should belong to the king, or other lord of the franchise. This was again confirmed with improvements by king Richard the first; who, in the second year of his reign,[i] not only established these concessions, by ordaining that the owner, if he was shipwrecked and escaped, "*omnes res suas liberas et quietas haberet,*" but also, that, if he perished, his children, or in default of them his brethren and sisters, should retain the property; and, in default of brother or sister, then the goods should remain to the king.[j] And the law, as laid down by Bracton in the reign of Henry III., seems still to have improved in its equity. For

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[f] Dr. & St. d. 2. c. 51.

[g] Spelm. *Cod. apud* Wilkins, 305.

[h] 26 May, *A. D.* 1174. 1 Rym. *Fœd.* 36.

[i] Rog. Hoved. *in Ric.* I.

[j] In like manner Constantine the great, finding that by the imperial law the revenue of wrecks was given to the prince's treasury or *fiscus*, restrained it by an edict (*Cod.* 11. 5. 1.) and ordered them to remain to the owners; adding this humane expostulation, "*Quod enim jus habet fiscus in aliena* "*calamitate, ut de re tam luctuosa* "*compendium sectetur?*"

[292] then, if not only a dog, (for instance) escaped, by which the owner might be discovered, but if any certain mark were set on the goods by which they might be known again, it was held to be no wreck.[k] And this is certainly most agreeable to reason; the rational claim of the king being only founded upon this, that the true owner cannot be ascertained. Afterwards, in the statute of Westminster the first,[l] the time of limitation of claims, given by the charter of Henry II., is extended to a year and a day, according to the usage of Normandy;[m] and it enacts, that if a man, a dog, or a cat, escape alive, the vessel shall not be adjudged a wreck. These animals, as in Bracton, are only put for examples;[n] for it is now held,[o] that not only if any live thing escape, but if proof can be made of the property of any of the goods or lading which come to shore, they shall not be forfeited as wreck. The statute further ordains, that the sheriff of the county shall be bound to keep the goods a year and a day, (as in France for one year, agreeably to the maritime laws of Oleron,[p] and in Holland for a year and a half) that if any man can prove a property in them, either in his own right or by right of representation,[q] they shall be restored to him without delay; but, if no such property be proved within that time, they then shall be the king's. If the goods are of a perishable nature, the sheriff may sell them, and the money shall be liable in their stead.[r] This revenue of wrecks is frequently granted out to lords of manors, as a royal franchise; and if any one be thus entitled to wrecks in his own land, and the king's goods are wrecked thereon, the king may claim them at any time, even after the year and day.[s]

What is a legal wreck.

It is to be observed, that, in order to constitute a legal *wreck*, the goods must come to land. If they continue at sea, the law distinguishes them by the barbarous and uncouth appellations of *jetsam*, *flotsam*, and *ligan*. Jetsam is [293]

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[k] Bract. *l.* 3. c. 3.

[l] 3 Edw. I. c. 4.

[m] *Gr. Coustom.* c. 17.

[n] Flet. *l.* 1. c. 44. 2 Inst. 167. 5 Rep. 107. *Hamilton* v. *Davies*, *Trin.* 11 *Geo. III. B. R.*

[p] §. 28.

[q] 2 Inst. 168.

[r] Plowd. 166.

[s] 2 Inst. 168. Bro. *Abr. tit. Wreck.*

Jetsam, flotsam, and ligan.

where goods are cast into the sea, and there sink and remain under water: flotsam is where they continue swimming on the surface of the waves: ligan is where they are sunk in the sea, but tied to a cork or buoy, in order to be found again.[t] These are also the king's if no owner appears to claim them; but, if any owner appears, he is entitled to recover the possession. For even if they be cast overboard, without any mark or buoy, in order to lighten the ship, the owner is not by this act of necessity construed to have renounced his property:[u] much less can things ligan be supposed to be abandoned, since the owner has done all in his power to assert and retain his property. These three are therefore accounted so far a distinct thing from the former, that by the king's grant to a man of wrecks, things jetsam, flotsam, and ligan will not pass.[v]

Wrecks, in legal acceptation, are not frequent.

Wrecks, in their legal acceptation, are at present not very frequent: for, if any goods come to land, it rarely happens, since the improvement of commerce, navigation, and correspondence, that the owner is not able to assert his property within the year and day limited by law. And in order to preserve this property entire for him, and if possible to prevent wrecks at all, our laws have made many very humane regulations; in a spirit quite opposite to those savage laws, which formerly prevailed in all the northern regions of Europe, and a few years ago were still said to subsist on the coasts of the Baltic sea, permitting the inhabitants to seize on whatever they could get as lawful prize: or, as an author of their own expresses it, "*in naufragorum miseria et calamitate tanquam vultures ad prædam currare.*"[w] For by the statute 27 Edw. III. c. 13, if any ship be lost on the shore, and the goods come to land (which cannot, says the statute, be called wreck) they shall be presently delivered to the merchants, paying only a reasonable reward to those that saved and preserved them, which is entitled *salvage.* [294]

Salvage.

Also by the common law, if any persons (other than the sheriff) take any goods so cast on shore, which are not legal

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[t] 5 Rep. 106.

[u] *Quæ enim res in tempestate, levandæ navis causa, ejiciuntur, hæ dominorum permanent. Quia palam est, eas non eo animo ejici, quod quis habere nolit. Inst.* 2. 1. §. 48.

[v] 5 Rep 108.

[w] Stiernh. *de jure Sueon. l.* 3. *c.* 5

Statutes for the benefit of the shipwrecked.

wreck, the owners might have a commission to inquire and find them out, and compel them to make restitution.[x] And by statute 12 Ann. st. 2, c. 18, confirmed by 4 Geo. I. c. 12, in order to assist the distressed, and prevent the scandalous illegal practices on some of our sea-coasts, (too similar to those on the Baltic) it is enacted, that all head-officers and others of towns near the sea shall, upon application made to them, summon as many hands as are necessary, and send them to the relief of any ship in distress, on forfeiture of 100*l.*, and, in case of assistance given, salvage shall be paid by the owners, to be assessed by three neighbouring justices. All persons that secrete any goods shall forfeit their treble value: and if they wilfully do any act whereby the ship is lost or destroyed, by making holes in her, stealing her pumps, or otherwise, they are still guilty of a capital felony.[y] Lastly, by the statute 1 Vict. c. 89, s. 5, the exhibiting any false lights or signal with intent to bring any vessel into danger, is also one of the few remaining capital felonies;[z] and the forcibly preventing any person saving his life from any vessel in distress, wrecked, stranded, or cast on shore, is punishable by the same statute, ss. 7 & 12, with transportation for life; the plundering or stealing any part of any ship or vessel which shall be in distress, or wrecked, or stranded, or cast on shore, or any goods, merchandize, or articles of any kind, belonging to such ship or vessel, and also the malicious destruction of any part of any ship in distress or wrecked, or any goods, merchandize, or articles thereof, these latter offences are punishable by ss. 7, 8 & 10, with transportation for any term not exceeding fifteen years; in like manner as the destroying of trees, steeples, or other stated seamarks, is punished by the statute 8 Eliz. c. 13, with a forfeiture of 100*l.*, or outlawry. Moreover, by the statutes of George II. and her present majesty, many other salutary regulations are made, for the more effectually preserving ships of any nation in distress.[a]

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[x] F. N. B. 112.

[y] 1 Vict. c. 89, s. 5.

[z] See *ante*, p. 128. n. k.

[a] By the civil law, to destroy persons shipwrecked, or prevent their saving the ship, is capital. And to steal even a plank from a vessel in distress, or wrecked, makes the party

XII. The right to mines.

XII. A twelfth branch of the royal revenue, the right to mines, has its original from the king's prerogative of coinage, in order to supply him with materials: and therefore those mines, which are properly royal, and to which the king is entitled when found, are only those of silver and gold.[b] By the old common law, if gold or silver be found in mines of base metal, according to the opinion of some the whole was a royal mine, and belonged to the king; though others held that it only did so, if the quantity of gold or silver was of greater value than the quantity of base metal.[c] But now by the statutes 1 W. & M. st. 1, c. 30, and 5 W. & M, c. 6, this difference is made immaterial; it being enacted, that no mines of copper, tin, iron, or lead, shall be looked upon as royal mines, notwithstanding gold or silver may be extracted from them in any quantities: but that the king, or persons claiming royal mines under his authority, may have the ore, (other than tin-ore in the counties of Devon and Cornwall[d]) paying for the same a price stated in the act. This was an extremely reasonable law: for now private owners are not discouraged from working mines, through a fear that they may be claimed as royal ones; neither does the king depart from the just rights of his revenue, since he may have all the precious metal contained in the ore, paying no more for it than the value of the base metal which it is supposed to be; to which base metal the land-owner is by reason and law entitled.

XIII. Treasure-trove.

XIII. To the same original may in part be referred the revenue of treasure-trove (derived from the French word, *trouver*, to find) called in Latin *thesaurus inventus*, which is where any money or coin, gold, silver, plate, or bullion, is found hidden *in* the earth, or other private place, the owner thereof being unknown; in which case the treasure belongs to the king: but if he that hid it be known, or afterwards

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liable to answer for the whole ship and cargo. (*Ff.* 47. 9. 3.) The laws also of the Wisigoths, and the most early Neapolitan constitutions, punished with the utmost severity all those who neglected to assist any ship in distress, or plundered any goods cast on shore. (Lindenbrog. *Cod. LL. antiqu.* 146. 715.)

[b] 2 Inst. 577.

[c] Plowd. 336.

[d] The duties payable on the coinage of tin in the counties of Cornwall and Devon have recently been abolished. 1 & 2 Vict. c. 120.

found out, the owner and not the king is entitled to it.[e] Also if it be found in the sea, or *upon* the earth, it doth not [296] belong to the king, but the finder, if no owner appears.[f] So that it seems it is the *hiding*, and not the *abandoning* of it, that gives the king a property: Bracton[g] defining it, in the words of the civilians, to be "*vetus depositio pecuniæ*." This difference clearly arises from the different intentions, which the law implies in the owner. A man that hides his treasure in a secret place, evidently does not mean to relinquish his property; but reserves a right of claiming it again when he sees occasion: and, if he dies and the secret also dies with him, the law gives it the king, in part of his royal revenue. But a man that scatters his treasure into the sea, or upon the public surface of the earth, is construed to have absolutely abandoned his property, and returned it into the common stock, without any intention of reclaiming it: and therefore it belongs, as in a state of nature, to the first occupant, or finder; unless the owner appear and assert his right, which then proves that the loss was by accident, and not with an intent to renounce his property.

Treasure-trove formerly more frequent.

Formerly all treasure-trove belonged to the finder;[h] as was also the rule of the civil law.[i] Afterwards it was judged expedient for the purposes of the state, and particularly for the coinage, to allow part of what was so found to the king; which part was assigned to be all *hidden* treasure; such as is *casually lost* and unclaimed, and also such as is *designedly abandoned*, still remaining the right of the fortunate finder. And that the prince shall be entitled to this hidden treasure is now grown to be, according to Grotius,[j] "*jus commune, "et quasi gentium:*" for it is not only observed, he adds, in England, but in Germany, France, Spain, and Denmark. The finding of deposited treasure was much more frequent, and the treasures themselves more considerable, in the infancy of our constitution than at present. When the Romans, and other inhabitants of the respective countries which composed their empire, were driven out by the northern nations, they concealed their money under-ground: with a view of resorting to it again when the heat of the irruption should be over, and the invaders driven back to their deserts. But, as this never happened, the treasures were never claimed; and on the death of the owners the secret also died along with them. The conquering generals, being aware of the value of these hidden mines, made it highly penal to secrete them from the public service. In England therefore, as among the feudists,[k] the punishment of such as concealed from the king the finding of hidden treasure was formerly no less than death; but now it is only fine and imprisonment.[l] [297]

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[e] 3 Inst. 132. Dalt. of Sheriffs, c. 16.

[f] Britt. c. 17. Finch. L. 177.

[g] *l.* 3. *c.* 3. §. 4.

[h] Bracton. *l.* 3. *c.* 3. 3 Inst. 133.

[i] *Ff.* 41. 1. 31.

[j] *de jur. b. & p. l.* 2. *c.* 8. §. 7.

XIV. Waifs. XIV. Waifs, *bona waviata*, are goods stolen, and waived or thrown away by the thief in his flight, for fear of being apprehended. These are given to the king by the law, as a punishment upon the owner, for not himself pursuing the felon, and taking away his goods from him.[m] And therefore if the party robbed do his diligence immediately to follow and apprehend the thief, (which is called making fresh *suit*) or do convict him afterwards, or procure evidence to convict him, he shall have his goods again.[n] Waived goods do also not belong to the king, till seized by somebody for his use; for if the party robbed can seize them first, though at the distance of twenty years, the king shall never have them.[o] If the goods are hid by the thief, or left any where by him, so that he had them not about him, when he fled, and therefore did not throw them away in his flight; these also are not *bona waviata*, but the owner may have them again when he pleases.[p] The goods of a foreign merchant, though stolen and thrown away in flight, shall never be waifs:[q] the reason whereof may be, not only for the encouragement of trade, but also because there is no wilful default in the foreign merchant's not pursuing the thief; he being generally a stranger to our laws, our usages, and our language.

XV. Estrays. XV. Estrays are such valuable animals as are found wandering in any manor or lordship, and no man knoweth

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[k] Glanv. *l.* 1. *c.* 2. Crag. 1. 16. 40.

[l] 3 Inst. 133.

[m] Cro. Eliz. 694.

[n] Finch. L. 212.

[o] *Ibid.*

[p] 5 Rep. 109.

[q] Fitzh. *Abr. tit. Estray.* 1. 3 Bulstr. 19.

[298] the owner of them; in which case the law gives them to the king as the general owner and lord paramount of the soil, in recompense for the damage which they may have done therein: and they now most commonly belong to the lord of the manor, by special grant from the crown. But, in order to vest an absolute property in the king, or his grantees, they must be proclaimed in the church and two market towns next adjoining to the place where they are found: and then, if no man claims them, after proclamation and a year and a day passed, they belong to the king or his substitute without redemption;[r] even though the owner were a minor, or under any other legal incapacity.[s] A provision similar to which obtained in the old Gothic constitution, with regard to all things that were found, which were to be thrice proclaimed; *primum coram comitibus et viatoribus obviis, deinde in proxima villa vel pago, postremo coram ecclesia vel judicio:* and the space of a year was allowed for the owner to reclaim his property.[t] If the owner claims them within the year and day, he must pay the charges of finding, keeping, and proclaiming them.[u] The king or lord has no property till the year and day passed: for if a lord keepeth an estray three quarters of a year, and within the year it strayeth again, and another lord getteth it, the first lord cannot take it again.[v] Any beasts may be estrays, that are by nature tame or reclaimable, and in which there is a valuable property, as sheep, oxen, swine, and horses, which we in general call cattle; and so Fleta[w] defines them, *pecus vagens, quod nullus petit, sequitur vel advocat.* For animals upon which the law sets no value, as a dog or cat, and animals *feræ naturæ*, as a bear or wolf, cannot be considered as estrays. So swans may be estrays, but not any other fowl;[x] whence they are said to be royal fowl. The reason of which distinction seems to be, that, cattle and swans being of a reclaimed nature, the owner's property in them is not lost merely by their temporary escape; and they also, from their intrinsic value, are a sufficient pledge for the expence of the

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[r] Mirr. c. 3. §. 19.

[s] 5 Rep. 108. Bro. *Abr. tit. Estray.* Cro. Eliz. 716.

[t] Stiernh. *de jur. Gothor. l.* 3. *c.* 5.

[u] Dalt. Sh. 79.

[v] Finch. L. 177.

[w] *l.* 1. *c.* 43.

[x] 7 Rep. 17.

lord of the franchise in keeping them the year and day. For [299] he that takes an estray is bound, so long as he keeps it, to find it in provisions and preserve it from damage;[y] and may not use it by way of labour, but is liable to an action for so doing.[z] Yet he may milk a cow, or the like; for that tends to the preservation, and is for the benefit of the animal.[a]

Bona vacantia, definition of.

Besides the particular reasons before given why the king should have the several revenues of royal fish, shipwrecks, treasure-trove, waifs, and estrays, there is also one general reason which holds for them all; and that is, because they are *bona vacantia*, or goods in which no one else can claim a property. And therefore by the law of nature they belonged to the first occupant or finder; and so continued under the imperial law. But, in settling the modern constitutions of most of the governments in Europe, it was thought proper (to prevent that strife and contention, which the mere title of occupancy is apt to create and continue, and to provide for the support of public authority in a manner the least burthensome to individuals) that these rights should be annexed to the supreme power by the positive laws of the state. And so it came to pass that, as Bracton expresses it,[b] *hæc quæ nullius in bonis sunt, et olim fuerunt inventoris de jure naturali, jam efficiuntur principis de jure gentium.*

XVI. *Bona confiscata.*

XVI. The next branch of the king's ordinary revenue consists in forfeitures of lands and goods for offences; *bona confiscata,* as they are called by the civilians, because they belonged to the *fiscus* or imperial treasury; or, as our lawyers term them, *forisfacta;* that is, such whereof the property is gone away or departed from the owner. The true reason and only substantial ground of any forfeiture for crimes consist in this; that all property is derived from society, being one of those civil rights which are conferred upon individuals, in exchange for that degree of natural freedom, which every man must sacrifice when he enters into social communities. If therefore a member of any national [300] community violates the fundamental contract of his association, by transgressing the municipal law, he forfeits his right to such privileges as he claims by that contract; and the state may very justly resume that portion of property, or any part of it, which the laws have before assigned him. Hence, in every offence of an atrocious kind, the laws of England have exacted a total confiscation of the moveables or personal estate; and in many cases a perpetual, in others only a temporary, loss of the offender's immoveables or landed property: and have vested them both in the king, who is the person supposed to be offended, being the one visible magistrate in whom the majesty of the public resides. The particulars of these forfeitures it is not necessary to consider.[c] I therefore only mention them here, for the sake of regularity, as a part of the *census regalis;* and shall consider one species only, which arises from the misfortune rather than the crime of the owner, and is called a *deodand.*

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[y] 1 Roll. Abr. 889.

[z] Cro. Jac. 147.

[a] Cro. Jac. 148. Noy. 119.

[b] *l.* 1. *c.* 12.

Deodand, what it is, and the law relating to it.

By this is meant whatever personal chattel is the immediate occasion of the death of any reasonable creature: (or as is now the usual practice, the value of it) which is forfeited to the king, to be applied to pious uses, and distributed in alms by his high almoner;[d] though formerly destined to a more superstitious purpose. It seems to have been originally designed, in the blind days of popery, as an expiation for the souls of such as were snatched away by sudden death; and for that purpose ought properly to have been given to holy church:[e] in the same manner as the apparel of a stranger, who was found dead, was applied to purchase masses for the good of his soul. And this may account for that rule of law, that no deodand is due where an infant under the age of discretion is killed by a fall *from* a cart, or horse, or the like, not being in motion;[f] whereas, if an [301] adult person falls from thence and is killed, the thing is certainly forfeited. For the reason given by sir Matthew Hale seems to be very inadequate, *viz.* because an infant is not able to take care of himself: for why should the owner save his forfeiture, on account of the imbecility of the child, which ought rather to have made him more cautious to prevent any accident or mischief? The true ground of this rule seems rather to have been, that the child, by reason of it's want of discretion, was presumed incapable of actual sin, and therefore needed no deodand to purchase propitiatory masses: but every adult, who died in actual sin, stood in need of such atonement, according to the humane superstition of the founders of the English law.

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[c] As to the present law of forfeiture of real estate, see *Principles of Real Property,* p. 165.

[d] 1 Hal. P. C. 419. Fleta. *l.* 1. *c.* 25.

[e] Fitzh. *Abr. tit. Enditement. pl.* 27. Staunf. P. C. 20. 21.

[f] 3 Inst. 57. 1 Hal. P. C. 422.

Thus stands the law if a person be killed by a fall from a thing standing still. But if a horse, or ox, or other animal, of his own motion, kill as well an infant as an adult, or if a cart run over him, they shall in either case be forfeited as deodands;[g] which is grounded upon this additional reason, that such misfortunes are in part owing to the negligence of the owner, and therefore he is properly punished by such forfeiture. A like punishment is in like cases inflicted by the Mosaical law:[h] "if an ox gore a man that he die, "the ox shall be stoned, and his flesh shall not be eaten." And among the Athenians,[i] whatever was the cause of a man's death, by falling upon him, was exterminated or cast out of the dominions of the republic. Where a thing, not in motion, is the occasion of a man's death, that part only which is the immediate cause is forfeited; as if a man be climbing up the wheel of a cart, and is killed by falling from it, the wheel alone is a deodand:[j] but, wherever the thing is in motion, not only that part which immediately gives the wound, (as the wheel, which runs over his body) but all things which move with it and help to make the wound more dangerous (as the cart and loading, which increase the pressure [302] of the wheel) are forfeited.[k] It matters not whether the owner were concerned in the killing or not; for, if a man kills another with my sword, the sword is forfeited[l] as an accursed thing.[m] And therefore, in all indictments for homicide, the instrument of death and the value are presented and found by the grand jury (as, that the stroke was given by a certain penknife, value sixpence) that the king or his grantee may claim the deodand: for it is no deodand, unless it be presented as such by a jury of twelve men.[n] No deodands are due for accidents happening upon the high sea, that being out of the jurisdiction of the common law: but if a man falls from a boat or ship in fresh water, and is drowned, it hath been said, that the vessel and cargo are in strictness of law a deodand.[o] But juries have of late very frequently taken upon themselves to mitigate these forfeitures, by finding only some trifling thing, or part of an entire thing, to have been the occasion of the death. And in such cases, although the finding by the jury be hardly warrantable by law, the court of king's bench hath generally refused to interfere on behalf of the lord of the franchise, to assist so unequitable a claim.[p] Juries have however sometimes exercised a wholesome restraint over accidents, the result of wilful negligence, by fixing a very large sum by way of deodand.

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[g] *Omnia, quæ movent ad mortem, sunt Deo danda.* Bracton. *l.* 3. *c.* 5.

[h] Exod. xxi. 28.

[i] Æschin. *cont. Ctesiph.* Thus too by our ancient law, a well in which a person was drowned, was ordered to be filled up, under the inspection of the coroner. Flet. *l.* 1 *c.* 25. §. 10. Fitzh. Abr. *t. corone.* 416.

[j] 1 Hal. P.C. 422.

[k] 1 Hawk. P.C. c. 26.

[l] A similar rule obtained among the ancient Goths. *Si quis, me nesciente, quocunque meo telo vel instrumento in perniciem suam abutatur; vel ex ædibus meis cadat, vel incidat in puteum meum, quantumvis tectum et munitum, vel in cataractam, et sub molendino meo confringatur, ipse aliqua mulcta plectur; at in parte infelicitatis meæ numeretur, habuisse vel ædificasse aliquod quo homo periret.* Stiernhook *de jure Goth. l.* 3. *c* 4.

Deodands, and forfeitures in general, as well as wrecks, treasure-trove, royal fish, mines, waifs, and estrays, may be granted by the king to particular subjects, as a royal franchise: and indeed they are frequently granted out to the lords of manors, or other liberties: to the perversion of their original design. Provision is made for the more speedy return and recovery of those in the hands of the crown, by a recent statute.[q]

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XVII. Escheats.

XVII. Another branch of the king's ordinary revenue arises from escheats of lands, which happen upon the defect of heirs to succeed to the inheritance; whereupon they in general revert to and vest in the king, who is esteemed, in the eye of the law, the original proprietor of all the lands in the kingdom. But the discussion of this topic more properly belongs to the rights of things than the rights of persons.[r]

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[m] Dr. & St. d. 2. c. 51.

[n] 3 Inst. 57.

[o] 3 Inst. 58. 1 Hal. P. C. 423. Molloy *de jur. maritim.* 2. 225. A large deodand was recently fixed on a steam-boat, the boiler of which burst, with loss of life. The case I believe is now before the Queen's Bench.

[p] Foster of Homicide, 266.

[q] 3 & 4 W. IV. c. 99. See *ante*, p. 301. n. y.

XVIII. The custody of idiots and lunatics.

XVIII. I proceed therefore to the eighteenth and last branch of the king's ordinary revenue; which consists in the custody of idiots, from whence we shall be naturally led to consider also the custody of lunatics.

Idiot, who is considered such.

An idiot, or natural fool, is one that hath had no understanding from his nativity; and therefore is by law presumed never likely to attain any. For which reason the custody of him and of his lands was formerly vested in the lord of the fee;[s] (and therefore still, by special custom, in some manors the lord shall have the ordering of idiot and lunatic copyholders)[t] but, by reason of the manifold abuses of this power by subjects, it was at last provided by common consent, that it should be given to the king, as the general conservator of his people: in order to prevent the idiot from wasting his estate and reducing himself and his heirs to poverty and distress.[u] This fiscal prerogative of the king is declared in parliament by statute 17 Edw. II. c. 9, which directs (in affirmance of the common law)[v] that the king shall have ward of the lands of natural fools, which has been construed to mean also the goods and chattels,[w] taking the profits without waste or destruction, and shall find them necessaries: and after the death of such idiots he shall render the estate to the heirs: in order to prevent such idiots from aliening their lands, and their heirs from being disinherited.

The writ *de idiota inquirendo.*

By the old common law there is a writ *de idioto inquirendo*, to inquire whether a man be an idiot or not:[x] which must be tried by a jury of twelve men: and, if they find him *purus idiota*, the profits of his lands, and the custody of his person [304] may be granted by the king to some subject, who has interest enough to obtain them.[y] This branch of the revenue hath been long considered as a hardship upon private families:

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[r] See *Principles of Real Property*, pp. 152—156.

[s] Flet. *l.* 1. *c.* 11. §. 10.

[t] Dyer, 302. Hutt. 17. Noy. 27.

[u] F. N. B. 232.

[v] 4 Rep. 126. *Memorand' Scacc'* 20 *Edw. I.* (prefixed to Maynard's year-book of Edw. II.) fol. 20. 24.

[w] See *Oxenden* v. *Lord Compton*, 2 Ves. J. 69.

[x] F. N. B. 232.

[y] This power, though of late very rarely exerted, is still alluded to in common speech, by that usual expression of *begging* a man for a fool.

and so long ago as in the 8 Jac. I. it was under the consideration of parliament, to vest this custody in the relations of the party, and to settle an equivalent on the crown in lieu of it: it being then proposed to share the same fate with the slavery of the feudal tenures, which has been since abolished.[z] Yet few instances can be given of the oppressive exertion of it, since it seldoms happens that a jury finds a man an idiot *a nativitate*, but only *non compos mentis* from some particular time; which has an operation very different in point of law.

A man is not an idiot,[a] if he hath any glimmering of reason, so that he can tell his parents, his age, or the like common matters. But a man who is born deaf, dumb, and blind, is looked upon by the law as in the same state with an idiot;[b] he being supposed incapable of any understanding, as wanting all those senses which furnish the human mind with ideas.

A lunatic, who is considered such.

A lunatic, or *non compos mentis*, is one who hath had understanding, but by disease, grief, or other accident hath lost the use of his reason.[c] A lunatic is indeed properly one that hath lucid intervals; sometimes enjoying his senses, and sometimes not, and that frequently in the opinion of some[d] depending upon the change of the moon. But under the general name of *non compos mentis* (which sir Edward Coke says is the most legal name)[e] are comprised not only lunatics, but persons under frenzies; or who lose their intellects by disease; those that *grow* deaf, dumb, and blind, not being *born* so; or such, in short, as are judged as well at law as in equity,[f] incapable of conducting their own affairs. To these also, as well as idiots, the king is guardian, but to a very different purpose. For the law always imagines, that these accidental misfortunes may be removed; and therefore only [305] constitutes the crown a trustee for the unfortunnte persons, to protect their property, and to account to them for all profits received, if they recover, or after their decease to their representatives. And therefore it is declared by the statute 17 Edw. II. c. 10, that the king shall provide for the custody and sustentation of lunatics, and preserve their lands and the profits of them for their use, when they come to their right mind; and the king shall take nothing to his own use: and if the parties die in such estate, the residue shall be distributed for their souls by the advice of the ordinary, and of course (by the subsequent amendments of the law of administration) shall now go to their executors or administrators.

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[z] 4 Inst. 203. Com. Journ. 1610.

[a] F. N. B. 233.

[b] Co. Litt. 42. Fleta. *l.* 6. *c.* 40.

[c] *Idiota a casu et infirmitate.* (*Mem'. Scacch'.* 20 *Edw. I.* in Maynard's year-book of Edw. II. 20.) See Beverley's case, 4 Rep. 148, for the different kinds of *non compos mentis.*

[d] Lord Hardwicke considers that what is called lunacy is not affected by the moon, but is entirely owing to a defect of the organs of the body. *Ex-parte Barnsley*, 3 Atk. 174.

[e] 1 Inst. 246.

[f] Blackstone says, "as are judged "by the Court of Chancery incapable "of conducting their own affairs." But the rules of judging of insanity are the same at law and in equity. *Osmond* v. *Fitzroy*, 3 P. Wms. 130. *Bennett* v. *Vade*, 2 Atk. 327. *Ex-parte Barnsley*, 3 Atk. 168. Lord *Donegal's* case, 2 Ves. 407. 1 Fonbl. Eq. 63.

On first attack of lunacy it is usual to confine the lunatic.

On the first attack of lunacy, or other occasional insanity, while there may be hopes of a speedy restitution of reason, it is usual to confine the unhappy objects in private custody under the direction of their nearest friends and relations: and the legislature, to prevent all abuses incident to such private custody, hath thought proper to interpose its authority, by 2 and 3 Wm. IV. c. 107, partially amended by 3 and 4 Wm. IV. c. 64, and continued by the 1 and 2 Vict. c. 73, for regulating private mad-houses. By the 2 and 3 Wm. IV. c. 107, s. 27, no person can be sent to a private madhouse except under a written order of some person by whose direction the lunatic is confined, and a medical certificate of two physicians, surgeons, or apothecaries; and it has been held, in the construction of this statute, that a medical man is not warranted, merely on the statements of the relations of a person supposed to be insane, in sending men to take him into custody, unless he is satisfied that such a step is necessary to prevent some immediate injury from being done.[g] But, when the disorder is grown permanent, and the circumstances of the party will bear such additional expense, it is proper to apply to the royal authority to warrant a lasting confinement.

The method of proving a person *non compos*

The method of proving a person *non compos* is very similar to that of proving him an idiot. The lord chancellor, the writ *de lunatico inquirendo.* to whom, by special authority from the king, the custody of idiots and lunatics is usually entrusted,[h] upon petition or information, grants a commission in nature of the writ *de idiota inquirendo*, to inquire into the party's state of mind: which may now be directed to a single commissioner,[i] and if he be found *non compos*, he usually commits the care of his person, with a suitable allowance for his maintenance, to some friend, who is then called his committee. However, to prevent sinister practices, the next heir is seldom permitted to be this committee of the person; because it is his interest that the party should die. But it hath been said, there [306] lies not the same objection against his next of kin, provided he be not his heir; for it is his interest to preserve the lunatic's life, in order to increase the personal estate by savings, which he or his family may hereafter be entitled to enjoy.[j] The heir is generally made the manager or committee of the estate, it being clearly his interest by good management to keep it in condition: accountable however to the court of chancery, and to the *non compos* himself, if he recovers; or otherwise, to his administrators.

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[g] *Anderdon* v. *Burrows*, 4 Car. & P. 210. The other statutes relating to the custody of lunatics are the 3 & 4 Wm. IV. c. 36, and the 9 Geo. IV. c. 40, and the 1 Vict. c. 14

The law as to prodigals. In this case of idiots and lunatics the civil law agrees with ours; by assigning them tutors to protect their persons, and curators to manage their estates. But in another instance the Roman law goes much beyond the English. For, if a man by notorious prodigality was in danger of wasting his estate, he was looked upon as *non compos*, and committed to the care of curators or tutors by the prætor.[k] And by the laws of Solon such prodigals were branded with perpetual infamy.[l] But with us, when a man on an inquest of idiocy hath been returned an *unthrift* and not an *idiot*,[m] no farther proceedings have been had. And the propriety of the practice itself seems to be very questionable. It was doubtless an excellent method of benefiting the individual, and of preserving estates in families; but it hardly seems calculated for the genius of a free nation, who claim and exercise the liberty of using their own property as they please. "*Sic* "*utere tuo, ut alienum non lædas*," is the only restriction our laws have given with regard to economical prudence. And the frequent circulation and transfer of lands and other property, which cannot be effected without extravagance somewhere, are perhaps not a little conducive towards keeping our mixed constitution in its due health and vigour.

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[h] 3 P. Wms. 108. *Exparte* Phillips, 19 Ves. 122.

[i] 3 & 4 W. IV. c. 36. Otherwise the commission is executed by three commissioners. In the metropolis there are five standing commissioners of lunacy, to whom all commissions are usually directed. In the country there are no fixed commissioners.

[j] 2 P. Wms. 638.

[k] *Solent prætores, si talem hominem invenerint, qui neque tempus neque finem expensarum habet, sed bona sua dilacerando et dissipando profundit, curatorem ei dare, exemplo furiosi: et tamdiu erunt ambo in curatione, quamdiu vel furiosus sanitatem, vel ille bonos mores, receperit.* *Ff.* 27. 10. 1.

[l] Potter Antiqu. b. 1. c. 26.

[m] Bro. *Abr. tit. Idiot*, 4.

The ordinary revenue of the crown is inconsiderable.

This may suffice for a short view of the king's *ordinary* revenue, or the proper patrimony of the crown: which was very large formerly, and capable of being increased to a magnitude truly formidable: for there are very few estates in the kingdom, that have not, at some period or other since [307] the Norman conquest, been vested in the hands of the king by forfeiture, escheat, or otherwise. But, fortunately for the liberty of the subject, this hereditary landed revenue, by a series of improvident management, is sunk almost to nothing; and the casual profits, arising from the other branches of the *census regalis*, are likewise almost all of them alienated from the crown. In order to supply the deficiencies of which, we are now obliged to have recourse to new methods of raising money, unknown to our early ancestors; which methods constitute the king's *extraordinary* revenue. For, the public patrimony being got into the hands of private subjects, it is but reasonable that private contributions should supply the public service. Which, though it may perhaps fall harder upon some individuals, whose ancestors have had no share in the general plunder, than upon others, yet, taking the nation throughout, it amounts to nearly the same; provided the gain by the extraordinary, should appear to be no greater than the loss by the ordinary, revenue. And, perhaps, if every gentleman in the kingdom was to be stripped of such of his lands as were formerly the property of the crown; was to be again subject to the inconveniences of purveyance and pre-emption, the oppression of forest laws, and the slavery of feudal tenures; and was to resign into the king's hands all his royal franchises of

The extraordinary revenue or taxes,

waifs, wrecks, estrays, treasure-trove, mines, deodands, forfeitures, and the like; he would find himself a greater loser than by paying his *quota* to such taxes, as are necessary to the support of government. The thing therefore to be wished and aimed at in a land of liberty is by no means the total abolition of taxes, which would draw after it very pernicious consequences, and the very supposition of which is the height of political absurdity. For as the true idea of government and magistracy will be found to consist in this, that some few men are deputed by many others to preside over public affairs, so that individuals may the better be enabled to attend their private concerns; it is necessary that those individuals should be bound to contribute a portion of their private gains, in order to support that government, and reward that magistracy, which protects them in the enjoyment [308] of their respective properties. But the things to be aimed at are wisdom and moderation, not only in granting, but also in the method of raising the necessary supplies; by contriving to do both in such a manner as may be most conducive to the national welfare, and at the same time most consistent with economy and the liberty of the subject; who, when properly taxed, contributes only, as was before observed,[n] some part of his property, in order to enjoy the rest.

which arise from supplies, how these are obtained.

These extraordinary grants are usually called by the synonymous names of aids, subsidies, and supplies; and are granted, we have formerly seen,[o] by the commons of Great Britain in parliament assembled: who, when they have voted a supply to his majesty, and settled the *quantum* of that supply, usually resolve themselves into what is called a committee of ways and means, to consider the ways and means of raising the supply so voted. And in this committee every member (though it is looked upon as the peculiar province of the chancellor of the exchequer) may propose such scheme of taxation as he thinks will be least detrimental to the public. The resolutions of this committee, when approved by a vote of the house, are in general esteemed to be (as it were) final and conclusive. For, though the supply cannot be actually raised upon the subject till directed by an act of the whole parliament, yet no monied man will scruple to advance to the government any quantity of ready cash, on the credit of a bare vote of the house of commons, though no law be yet passed to establish it.

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[n] page 293.

[o] page 165.

Blackstone's classification of the taxes now erroneous.

Blackstone has divided the taxes which are raised upon the subject, into annual and perpetual, and has classed the land-tax and malt-tax under the first head, but since his Commentaries were written the land-tax and malt-tax have both ceased to be annual, and are now perpetual.[p] This classification therefore is no longer correct. It will, however, be convenient to consider the land-tax and malt-tax in the first instance, although in most public returns a different arrangement is pursued. We shall therefore consider the various branches of the extraordinary revenue in the following order: 1. The land-tax. 2. The malt-tax. 3. Customs. 4. Excise. 5. The Post-office. 6. Stamps. 7. Assessed Taxes. 8. Duty on offices and pensions.

The land-tax, how it arose.

I. The land-tax, in its modern shape, has superseded all the former methods of rating either property, or persons in respect of their property, whether by tenths or fifteenths, subsidies on land, hydages, scutages, or talliages; a short explication of which will however greatly assist us in understanding our ancient laws and history.

Tenths, fifteenths, and aids.

Tenths, and fifteenths,[q] were temporary aids issuing out of personal property, and granted to the king by parliament. They were formerly the real tenth or fifteenth part of all the moveables belonging to the subject; when such moveables, or personal estates, were a very different and a much less considerable thing than what they usually are at this day. Tenths are said to have been first granted under Henry the second, who took advantage of the fashionable zeal for croisades to introduce this new taxation, in order to defray the expence of a pious expedition to Palestine, which he really or seemingly had projected against Saladine emperor of the Saracens; whence it was originally denominated the Saladine tenth.[r] But afterwards fifteenths were more usually granted than tenths. Originally the amount of these taxes was uncertain, being levied by assessments new made at every fresh grant of the commons, a commission for which is preserved by Matthew Paris:[s] but it was at length reduced to a certainty in the eighth year of Edward III., when, by virtue of the king's commission, new taxations were made of every township, borough, and city in the kingdom, and recorded in the exchequer; which rate was, at the time, the fifteenth part of the value of every township, the whole amounting to about 29,000*l.* and therefore it still kept up the name of a fifteenth, when, by the alteration of the value of money and the increase of personal property, things came to be in a very different situation. So that when, of later years, the commons granted the king a fifteenth, every parish in England immediately knew their proportion of it; that is, the same identical sum that was assessed by the same aid in the eighth of Edward III.; and then raised it by a rate among themselves, and returned it into the royal exchequer.

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[p] 38 Geo. III. c. 60. 3 Geo. IV. c. 18.

[q] 2 Inst. 77. 4 Inst. 34.

[r] Hoved. *A. D* 1188. Carte, 1, 719. Hume i. 329.

The other ancient levies were in the nature of a modern land-tax: for we may trace up the original of that charge as high as to the introduction of our military tenures; when every tenant of a knight's fee was bound, if called upon, to attend the king in his army for forty days in every year. [310] But this personal attendance growing troublesome in many respects, the tenants found means of compounding for it, by first sending others in their stead, and in process of time by making a pecuniary satisfaction to the crown in lieu of it. This pecuniary satisfaction at last came to be levied by assessments, at so much for every knight's fee, under the name of scutages; which appear to have been levied for the first time in the fifth year of Henry the second, on account of his expedition to Toulouse, and were then (I apprehend) mere arbitrary compositions, as the king and the subject could agree. But this precedent being afterwards abused into a means of oppression, (in levying scutages on the landholders by the royal authority only, whenever our kings went to war, in order to hire mercenary troops and pay their contingent expences) it became thereupon a matter of national complaint; and king John was obliged to promise in his *magna carta*,[t] that no scutage should be imposed

Scutages.

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[s] *A. D.* 1232.

[t] *Cap.* 14.

without the consent of the common council of the realm. This clause was indeed omitted in the charters of Henry III., where[u] we only find it stipulated, that scutages should be taken as they were used to be in the time of king Henry the second. Yet afterwards, by a variety of statutes under Edward I. and his grandson,[v] it was provided, that the king shall not take any aids or tasks, any talliage or tax, but by the common assent of the great men and commons in parliament.

Hydage and talliage.

Of the same nature with scutages upon knights-fees were the assessments of hydage upon all other lands, and of talliage upon cities and burghs.[w] But they all gradually fell into disuse upon the introduction of subsidies, about the time of king Richard II. and king Henry IV. These were a tax, not immediately imposed upon property, but upon persons in respect of their reputed estates, after the nominal rate of 4*s.* in the pound for lands, and 2*s.* 8*d.* for goods; and for those of aliens in a double proportion. But this assessment was also made according to an ancient valuation; wherein the computation was so very moderate, and the rental of the kingdom was supposed to be so exceeding [311] low, that one subsidy of this sort did not, according to sir Edward Coke,[x] amount to more than 70,000*l.*, whereas a modern land-tax at the same rate would produce more than two millions. It was anciently the rule never to grant more than one subsidy, and two fifteenths at a time: but this rule was broken through for the first time on a very pressing occasion, the Spanish invasion in 1588; when the parliament gave queen Elizabeth two subsidies and four fifteenths. Afterwards, as money sunk in value, more subsidies were given; and we have an instance in the first parliament of 1640, of the king's desiring twelve subsidies of the commons, to be levied in three years; which was looked upon as a startling proposal: though lord Clarendon says,[y] that the Speaker, serjeant Glanville, made it manifest to the house, how very inconsiderable a sum twelve subsidies amounted to, by telling them he had computed what he was to pay for them himself;

Subsidies.

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[u] 9 Hen. III. c. 37.

[v] 25 Edw. I. c. 5 & 6. 34 Edw. I. st. 4, c. 1. 14 Ed. III. st. 2, c. 1.

[w] Madox. Hist. Exche. 480.

[x] 4 Inst. 33.

[y] Hist. b. 2.

and when he named the sum, he being known to be possessed of a great estate, it seemed not worth any farther deliberation. And indeed, upon calculation, we shall find, that the total amount of these twelve subsidies, to be raised in three years, is less than what has frequently been raised in one year, by a land tax of two shillings in the pound.

Grants by the clergy.

The grant of scutages, talliages, or subsidies by the commons did not extend to spiritual preferments; those being usually taxed at the same time by the clergy themselves in convocation: which grants of the clergy were confirmed in parliament, otherwise they were illegal, and not binding; as the same noble writer observes of the subsidies granted by the convocation, which continued sitting after the dissolution of the first parliament in 1640. A subsidy granted by the clergy was after the rate of 4*s.* in the pound according to the valuation of their livings in the king's books; and amounted, as sir Edward Coke tells us,[z] to about 20,000*l.* While this custom continued, convocations were wont to sit as frequently as parliaments:[a] but the last subsidies, thus given by the clergy, were those confirmed by statute 15 Car. II. c. 10, since which another method of taxation [312] has generally prevailed, which takes in the clergy as well as the laity: in recompense for which the beneficed clergy have from that period been allowed to vote at the election of knights of the shire;[b] and thenceforward also the practice of giving ecclesiastical subsidies hath fallen into total disuse.

How lay subsidies were formerly levied

The lay subsidy was usually raised by commissioners appointed by the crown, or the great officers of state: and therefore in the beginning of the civil wars between Charles I. and his parliament, the latter having no other sufficient revenue to support themselves and their measures, introduced the practice of laying weekly and monthly assessments[c] of a specific sum upon the several counties of the kingdom; to be levied by a pound rate on lands and personal estates: which were occasionally continued during the whole usurpation, sometimes at the rate of 120,000*l.*

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[z] 4 Inst. 33.

[a] See as to the convocation, *ante* p. 291.

[b] Dalt. of sheriffs, 418. Gilb. Hist. of Exch. c. 4.

[c] 29 Nov. 4 Mar. 1642

a month, sometimes at inferior rates.[d] After the Restoration the ancient method of granting subsidies, instead of such monthly assessments, was once and once only, renewed; *viz.* in 1663, when four subsidies were granted by the temporalty, and four by the clergy;[e] which was the last time of raising supplies in that manner. For, the monthly assessments being now established by custom, being raised by commissioners named by parliament, and producing a more certain revenue; from that time forwards we hear no more of subsidies, but occasional assessments were granted as the national emergencies required.

These subsidies were a land tax.

These periodical assessments, the subsidies which preceded them, and the more ancient scutage, hydage, and talliage, were to all intents and purposes a land-tax; and the assessments were sometimes expressly called so.[f]

New valuation of estates made in the reign of Wm. III.

Yet a popular opinion has prevailed, that the land-tax was first introduced in the reign of king William III.; because in the year 1692 a new assessment or valuation of estates was made throughout the kingdom: which, though by no means a perfect one, had this effect, that a supply of 500,000*l.* was equal to 1*s.* in the pound of the value of the estates given in.

[313]

From 1693 to 1798 the land tax continued an annual charge.

And, according to this enhanced valuation, from the year 1693 to the year 1798, a period of above one hundred years, the land-tax continued an annual charge upon the subject; above half the time at 4*s.* in the pound, sometimes at 3*s.*, sometimes at 2*s.*, twice[g] at 1*s.*, but without any total intermission. The medium was 3*s.* 3*d.* in the pound; being equivalent with twenty-three ancient subsidies, and amounting annually to more than a million and a half of money.

Since perpetual.

But the last annual act was the 38 Geo. III. c. 5, which imposed the tax for one year at the rate of 4*s.* in the pound, and it was made perpetual at that rate by the 38 Geo. III. c. 60, being directed to be raised and paid yearly to the king and his heirs for ever, but subject however to redemption under the rules and regulations there laid down. This act has been amended by several other acts, and the whole have been repealed and consolidated and amended by the 42 Geo. III. c. 116. Power is given to persons under disabilities to redeem, and the consideration for redemption is to be in all ordinary cases so much capital stock of the three per cent. consolidated annuities, or the three per cent. reduced annuities, as will yield a dividend exceeding the amount of the land-tax redeemed by one-tenth part thereof. This act has been amended by the 54 Geo. III. c. 173, and other acts which it is not necessary for general purposes to mention. The method of raising the land-tax is by charging a particular sum upon each county, according to the valuation given in, *A.D.* 1692: and this sum is assessed and raised upon individuals (their personal estates, as well as real, being liable thereto) by commissioners appointed in the act, being the principal landholders of the county, and their officers.[h]

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[d] One of these bills of assessment, in 1656, is preserved in Scobell's collection, 400.

[e] Blackstone states, that in 1670, the sum of 800,000*l.* was raised by way of subsidy; but this is a mistake, as the mode of collecting it is totally different from the former subsidy assessments. Mr. Christian's note.

[f] Com. Journ. 26 June. 9 Dec. 1678.

[g] In the year 1732 and 1733.

II. The malt tax.

II. The other annual tax was the malt-tax; which was a sum raised every year by parliament, ever since 1697, by a duty of 6*d.* in the bushel on malt, and a proportionable sum on certain liquors, such as cyder and perry, which might otherwise prevent the consumption of malt. But the last annual act was passed in 1821, and by the 3 Geo. IV. c. 18, it became perpetual. This tax is under the management of the commissioners of the excise; and is indeed itself no other than a part of the excise, the nature of which species of taxation I shall presently explain: only premising at present, that after many fluctuations the duty on malt is now fixed at 2*s.* 7*d.* per bushel.

III. The customs.

III. The customs; or the duties, toll, tribute, or tariff, payable upon merchandize exported and imported. The considerations upon which this revenue (or the more ancient part of it, which arose only from exports) was invested in [314] the king, were said to be two;[i] 1. Because he gave the subject leave to depart the kingdom, and to carry his goods along with him. 2. Because the king was bound of common right to maintain and keep up the ports and havens, and to protect the merchant from pirates. Some have imagined

The history and origin thereof.

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[h] The last act appointing these commissioners is the 1 & 2 Vict. c. 57. See also 1 & 2 Vict. c. 58.

[i] Dyer, 165.

they are called with us customs, because they were the inheritance of the king by immemorial usage and the common law, and not granted him by any statute:[j] but sir Edward Coke hath clearly shewn,[k] that the king's first claim to them was by grant of parliament 3 Edw. I., though the record thereof is not now extant. And indeed this is in express words confessed by statute 25 Edw. I. c. 7, wherein the king promises to take no customs from merchants, without the common assent of the realm, "saving to us and our "heirs, the customs on wool, skins, and leather, formerly "granted to us by the commonalty aforesaid." These were formerly called the hereditary customs of the crown; and were due on the exportation only of the said three commodities, and of none other: which were styled the *staple* commodities of the kingdom, because they were obliged to be brought to those ports where the king's staple was established, in order to be there first rated, and then exported.[l] They were denominated in the barbarous Latin of our ancient records, *custuma*;[m] not *consuetudines*, which is the language of our law whenever it means merely usages. The duties on wool, sheep-skins, or woolfells, and leather, exported, were called *custuma antiqua sive magna:* and were payable by every merchant, as well native as stranger; with this difference, that merchant-strangers paid an additional toll, *viz.* half as much again as was paid by natives. The *custuma parva et nova* were an impost of *3d.* in the pound, due from merchant-strangers only, for all commodities as well imported as exported; which was usually called the alien's duty, and was first granted in 31 Edw. I.[n] But these ancient hereditary customs, especially those on wool and woolfells, came to be of little account, when the nation became sensible of the advantages of a home manufacture, and prohibited the exportation of wool by statute 11 Edw. III. c. 1. [315]

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[j] Dyer, 43, *pl.* 24.

[k] 2 Inst. 58, 59.

[l] Dav. 9.

[m] This appellation seems to be derived from the French word *coustum*, r *cútum*, which signifies toll or tribute, and owes its own etymology to the word *coust*, which signifies price, charge, or as we have adopted it in English, *cost*.

[n] 4 Inst. 29.

Prisage or butlerage.

There is also another very ancient hereditary duty belonging to the crown, called the *prisage* or *butlerage* of wines; which is considerably older than the customs, being taken notice of in the great roll of the exchequer, 8 Ric. I. still extant.[o] Prisage was a right of *taking* two tons of wine from every ship (English or foreign) importing into England twenty tons or more; one before and one behind the mast: which by charter of Edward I. was exchanged into a duty of *2s.* for every ton imported by merchant-strangers, and called butlerage, because paid to the king's butler.[p]

Subsidies. Tonnage. Poundage.

Other customs payable upon exports and imports were distinguished into subsidies, tonnage, poundage, and other imposts. Subsidies were such as were imposed by parliament upon any of the staple commodities before mentioned, over and above the *custuma antiqua et magna:* tonnage was a duty upon all wines imported, over and above the prisage and butlerage aforesaid: poundage was a duty imposed *ad valorem*, at the rate of 12*d.* in the pound, on all other merchandize whatsoever; and the other imposts were such as were occasionally laid on by parliament, as circumstances and times required.[q] These distinctions are now in a manner forgotten, except by the officers immediately concerned in this department; their produce being in effect all blended together, under the one denomination of the customs.

All blended under the denomination of customs.

Definition of customs. How granted.

By these we understand, at present, a duty or subsidy paid by the merchant, at the quay, upon all commodities imported as well as exported, or carried coastwise, by authority of parliament; unless where, for particular national reasons, certain rewards, bounties, or drawbacks, are allowed for particular exports or imports. Those of tonnage and poundage, in particular, were at first granted, as the old statutes (and particularly 1 Eliz. c. 19) express it) for the defence of the realm, and the keeping and safeguard of the seas, and for the intercourse of merchandize safely to come into and pass out of the same. They were at first usually granted only for a stated term of years, as, [316] for two years in 5 Rich. II.;[r] but in Henry the sixth's time, they were granted him for life by a statute in the thirty-first year of his reign: and again to Edward IV. for the term of his life also; since which time they were regularly granted to all his successors, for life, sometimes at the first, sometimes at other subsequent parliaments, till the reign of Charles the first: when, as the noble historian expresses it,[s] his ministers were not sufficiently solicitous for a renewal of this legal grant. And yet these imposts were imprudently and unconstitutionally levied and taken, without consent of parliament, for fifteen years together; which was one of the causes of those unhappy discontents, justifiable at first in too many instances, but which degenerated at last into causeless rebellion and murder. For, as in every other, so in this particular case, the king (previous to the commencement of hostilities) gave the nation ample satisfaction for the errors of his former conduct, by passing an act,[t] whereby he renounced all power in the crown of levying the duty of tonnage and poundage, without the express consent of parliament; and also all power of imposition upon any merchandizes whatever. Upon the Restoration this duty was granted to king Charles the second for life, and so it was to his two immediate successors; but now by three several statutes, 9 Ann. c. 6, 1 Geo. I. c. 12, and 3 Geo. I. c. 7, it is made perpetual and mortgaged for the debt of the public. The customs thus imposed by parliament were chiefly contained in two books of rates, set forth by parliamentary authority;[u] one signed by sir Harbottle Grimston, speaker of the house of commons in Charles the second's time; and the other an additional one signed by sir Spenser Compton, speaker in the reign of George the first; to which also subsequent additions have been made. But one of the most useful efforts of modern legislation, has been the consolidation of all the acts and regulations relating to the customs. The first act having this object, was passed in the year 1787, 27 Geo. III. c. 13. This, however, still left the law

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[o] Madox. Hist. Exch 526, 532.

[p] Dav. 8. 2 Bulst. 254. Stat. Estr. 16 Edw. II. Com. Journ. 27 Ap. 1689.

[q] Dav. 11, 12.

Duties and rates.

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[r] Dav. 12.

[s] Hist. Rebell. b. 3.

[t] 16 Car. I. c. 8.

[u] Stat. 12 Car. II. c. 4. 11 Geo. I. c. 7.

on this subject in a confused state, in which it continued until the year 1826, when by two acts, 6 Geo. IV. c. 105, and 7 Geo. IV. c. 48, all prior enactments were repealed, and all the acts relating to the subject consolidated in a masterly manner by the acts 6 Geo. IV. c. 106 to c. 116, both inclusive. These were again repealed in the year 1833, and re-enacted with fresh provisions by the 3 & 4 Wm. IV. c. 50, to c. 60, both inclusive: and in an annual act passed in every session, under the title of "An Act to "amend the laws relating to the Customs," all the new measures of the session are brought together. The last of these acts is the 1 & 2 Vict. c. 113, but it would be improper in an elementary work to enter into a detail on this subject.[v]

Duty on aliens.

Aliens formerly paid a larger proportion than natural subjects, which was what was generally understood by the alien's duty; to be exempted from which was one principal cause of the frequent applications to parliaments for acts of naturalization. But by the 24 Geo. III. sess. 2, c. 16, it was enacted that the petty custom or additional duty on all the goods of aliens or strangers should cease, except those which had been granted to the city of London, which still retains a trifling duty on what is called package, or *scavage*, on the goods of aliens.

[317]

Customs are a tax ultimately paid by the consumer.

These customs are then, we see, a tax immediately paid by the merchant, although ultimately by the consumer. And yet these are the duties felt least by the people; and, if prudently managed, the people hardly consider that they pay them at all. For the merchant is easy, being sensible he does not pay them for himself; and the consumer, who really pays them, confounds them with the price of the commodity: in the same manner as Tacitus observes, that the emperor Nero gained the reputation of abolishing the tax of the sale of slaves, though he only transferred it from the buyer to the seller; so that it was, as he expresses it, "*remissum magis specie, quam vi: quia, cum venditor* "*pendere juberetur, in partem pretii emptoribus accres-*

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[v] See Burn's Justice, edit. 28, where a complete account of the acts relating both to the customs and the excise is to be found.

"*cebat.*"[w] But this inconvenience attends it on the other hand, that these imposts, if too heavy, are a check and cramp upon trade; and especially when the value of the commodity bears little or no proportion to the quantity of the duty imposed. This in consequence gives rise also to smuggling, which then becomes a very lucrative employment: and its natural and most reasonable punishment, *viz.* confiscation of the commodity, is in such cases quite ineffectual; the intrinsic value of the goods, which is all that the smuggler has paid, and therefore all that he can lose, being very inconsiderable when compared with his prospect of advantage in evading the duty. Recourse must therefore be had to extraordinary punishments to prevent it, and capital ones have been inflicted: which destroys all proportion of punishment,[x] and puts murderers upon an equal footing with such as are really guilty of no natural, but merely a positive, offence. These have therefore been abolished, unless attended with peculiar circumstances.[y]

Disadvantages of exorbitant duties.

There is also another ill consequence attending high imposts on merchandize, not frequently considered, but indisputably certain; that the earlier any tax is laid on a commodity, the heavier it falls upon the consumer in the end: for every trader, through whose hands it passes, must have a profit, not only upon the raw material and his own labour and time in preparing it, but also upon the very tax itself, which he advances to the government; otherwise he loses the use and interest of the money which he so advances. To instance in the article of foreign paper. The merchant [318] pays a duty upon importation, which he does not receive again till he sells the commodity, perhaps at the end of three months. He is therefore equally entitled to a profit upon that duty which he pays at the custom-house, as to a profit upon the original price which he pays to the manufacturer abroad; and considers it accordingly in the price he demands of the stationer. When the stationer sells it again, he requires a profit of the printer or bookseller upon the whole sum advanced by him to the merchant:

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[w] *Hist. l.* 13.

[x] Montesq. Sp. L. b. 13, c. 8.

[y] As to the crimes punishable with death, see *ante* p. 128 n. [k]. See also an act for the prevention of smuggling, 3 & 4 Wm. 4, c. 53.

and the bookseller does not forget to charge the full proportion to the student or ultimate consumer; who therefore does not only pay the original duty, but the profits of these three intermediate traders, who have successively advanced it for him. This might be carried much farther in any mechanical, or more complicated, branch of trade. The customs produced the enormous sum of £19,154,729 in the year ending Jan. 5, 1839.

IV. The excise.

IV. Directly opposite in its nature to this is the excise duty; which is an inland imposition, paid sometimes upon the consumption of the commodity, or frequently upon the retail sale, which is the last stage before the consumption. This is doubtless, impartially speaking, the most economical way of taxing the subject: the charges of levying, collecting, and managing the excise duties being considerably less in proportion, than in other branches of the revenue. It also renders the commodity cheaper to the consumer, than charging it with customs to the same amount would do; for the reason just now given, because generally paid in a much later stage of it. The excise duty is also a great check to the adulteration of the articles on which it is levied. But, at the same time, the rigour and arbitrary proceedings of excise laws seem hardly compatible with the temper of a free nation. For the frauds that might be committed in this branch of the revenue, unless a strict watch is kept, make it necessary, wherever it is established, to give the officers a power of entering and searching the houses of such as deal in exciseable commodities, at any hour of the day, and in many cases, of the night likewise. And the proceedings in case of transgressions are so summary and sudden, that a man may be convicted in two days time in the penalty of many thousand pounds by two commissioners [319] or justices of the peace; to the total exclusion of the trial by jury, and disregard of the common law. For which reason, though lord Clarendon tells us,[z] that to his knowledge the earl of Bedford (who was made lord treasurer by king Charles the first, to oblige his parliament) intended to have set up the excise in England, yet it never made a part of that unfortunate prince's revenue; being first introduced, on the model of the Dutch prototype, by the parliament itself after its rupture with the crown.[a] Yet such was the opinion of its general unpopularity, that when in 1642 "aspersions were cast by malignant persons upon the "house of commons, that they intended to introduce excises, "the house for its vindication therein did declare, that "these rumours were false and scandalous; and that their "authors should be apprehended and brought to condign "punishment."[b] However, its original[c] establishment was in 1643, and its progress was gradual; being at first laid upon those persons and commodities, where it was supposed the hardship would be least perceivable, *viz.* the makers and vendors of beer, ale, cyder, and perry,[d] and the royalists at Oxford soon followed the example of their brethren at Westminster by imposing a similar duty; both sides protesting that it should be continued no longer than to the end of the war, and then be utterly abolished.[e] But the parliament at Westminster soon after imposed it on flesh, wine, tobacco, sugar, and such a multitude of other commodities, that it might fairly be denominated general: in pursuance of the plan laid down by Mr. Pymme (who seems to have been the father of the excise) in his letter to Sir John Hotham,[f] signifying, "that they had proceeded in [320] "the excise to many particulars, and intended to go on "farther; but that it would be necessary to use the people "to it by little and little." And afterwards, when the nation had been accustomed to it for a series of years, the

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[z] Hist. b. 3.

Originally established in 1643.

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[a] An excise on spirits was imposed very soon after the United States of America were declared independent in the year 1790.

[b] Com. Journ. 8 Oct. 1642.

[c] The translator and continuator of Petavius's Chronological History (Lond. 1659, fol.) informs us, that it was first moved for, 28 Mar. 1643, by Mr. Prynne. And it appears from the journals of the commons, that on that day the house resolved itself into a committee to consider of raising money, in consequence of which the excise was afterwards voted. But Mr. Prynne was not a member of parliament till 7 Nov. 1658; and published in 1654, "A protestation against the "illegal, detestable, and oft-condemned tax and extortion of excise in "general." It is probably therefore a mistake of the printer, for Mr. Pymme, who was intended for chancellor of the exchequer under the earl of Bedford. Lord Clar. b. 7.

[d] Com. Journ. 17 May 1643.

[e] Lord Clar. b. 7.

[f] 30 May 1643. Dugdale of the troubles, 120.

succeeding champions of liberty boldly and openly declared, "the impost of excise to be the most easy and indifferent "levy that could be laid upon the people:"[g] and accordingly continued it during the whole usurpation. Upon king Charles's return, it having then been long established and its produce well known, some part of it was given to the crown, in 12 Car. II. by way of purchase (as was before observed) for the feudal tenures and other oppressive parts of the hereditary revenue. And this is still called an hereditary excise.[h] But, from its first original to the present time, its very name has been odious to the people of England. It has nevertheless been imposed on abundance of other commodities in the reigns of king William III. and every succeeding prince, to support the enormous expenses occasioned by our wars on the continent. Thus brandies and other spirits are now excised at the distillery; printed silks and linens, at the printer's; starch and hair powder, at the maker's; gold and silver wire, at the wire-drawer's; plate in the hands of the vendor, who pays yearly for a licence to sell it; lands and goods sold by auction, for which a pound rate is payable by the auctioneer, who also is charged with an annual duty for his licence; and coaches and other wheel carriages, for which the occupier is excised, though not with the same circumstances of arbitrary strictness, as in most of the other instances. To these we may add coffee and tea, chocolate and cocoa paste, for which the duty is paid by the retailer: all artificial wines, commonly called sweets; paper and pasteboard, first when made, and again if stained or printed; malt as before mentioned, and now rendered a perpetual tax; vinegars; and the manufacture of glass,[i] for all which the duty is paid by the manufacturer; hops, for which the person that gathers them is answerable; candles and soap, which are [321] paid for at the maker's; malt liquors brewed for sale, which are excised at the brewery; cyder and perry, at the vendor's; and leather and skins, at the tanner's. "A list, which" in

Part of it given to Car. II. 12 Car. II. c. 23.

Exciseable articles.

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[g] Ord. 14 Aug. 1649, c. 50. *Scobell*, 72. Stat. 1656. c. 19. *Scobell*, 453.

[h] 1 Wm. IV. c. 51.

[i] The duties as to glass have been recently consolidated by the 1 & 2 Vict. c. 44.

the opinion of Blackstone, "no friend to his country would wish to see farther increased."

It has, however, been increased, and all the exciseable articles are now too numerous to be here fully given. They are mostly to be found at length in the 49 Geo. III. c. 69. The principal additions are, hides at the dresser's and makers of vellum; bricks and tiles at the maker's; and tobacco and snuff at the manufacturer's. But the statutes relating to the excise require consolidation fully as much as those relating to the customs did before the recent acts for that purpose.[j] This branch of the revenue produced the sum of £11,864,114 during the year ending January 5, 1839.

A duty was formerly levied upon salt, which was another distinct branch of his majesty's extraordinary revenue, and consisted in an excise of 3*s*. 4*d*. per bushel imposed upon all salt, by several statutes of king William and other subsequent reigns. But by statute 5 Geo. IV. c. 65, the duty both on salt and rock salt was taken off, whether as to excise or customs; although by statute 6 Geo. IV. c. 105, so much of this act as related to the customs was repealed.

Excise on salt taken off.

V. The post-office established in 1613, its rise and history.

V. Another very considerable branch of the revenue is levied with greater cheerfulness, as, instead of being a burden, it is a manifest advantage to the public. I mean the post-office, or duty for the carriage of letters. As we have traced the original of the excise to the parliament of 1643, so it is but justice to observe that this useful invention owes its first legislative establishment to the same assembly. It is true, there existed post-masters in much earlier times: but I apprehend their business was confined to the furnishing of post-horses to persons who were desirous to travel expeditiously, and to the dispatching of extraordinary pacquets upon special occasions. King James I. originally erected a post-office under the control of one Matthew de Quester or de l'Equester for the conveyance of letters to and from foreign parts; which office was afterwards claimed by lord Stanhope,[k] but was confirmed and continued to William [322] Frizell and Thomas Witherings by king Charles I. *A. D.* 1632, for the better accommodation of the English merchants.[l] In 1635, the same prince erected a letter-office for

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[j] See *ante* p. 329.

[k] Latch. Rep. 87.

[l] 19 Rym. *Foed.* 385.

England and Scotland, under the direction of the same Thomas Witherings, and settled certain rates of postage:[m] but this extended only to a few of the principal roads, the times of carriage were uncertain, and the post-masters on each road were required to furnish the mail with horses at the rate of 2½*d.* a mile. Witherings was superseded, for abuses in the execution of both his offices, in 1640; and they were sequestered into the hands of Philip Burlamachy, to be exercised under the care and oversight of the king's principal secretary of state.[n] On the breaking out of the civil war, great confusions and interruptions were necessarily occasioned in the conduct of the letter-office. And, about that time, the outline of the present more extended and regular plan seems to have been conceived by Mr. Edmond Prideaux, who was appointed attorney-general to the commonwealth after the murder of king Charles. He was chairman of a committee in 1642 for considering what rates should be set upon inland letters;[o] and afterwards appointed post-master by an ordinance of both the houses,[p] in the execution of which office he first established a *weekly* conveyance of letters into *all* parts of the nation;[q] thereby saving to the public the charge of maintaining post-masters, to the amount of 7,000*l.* *per annum.* And, his own emoluments being probably very considerable, the common council of London endeavoured to erect another post-office in opposition to his; till checked by a resolution of the house of commons,[r] declaring, that the office of postmaster is and ought to be in the sole power and disposal of the parliament. This office was afterwards farmed by one Manley in 1654.[s] But, in 1657, a regular post-office was erected by the authority of the protector and his parliament, upon nearly the same model as has been ever since adopted, and with the same rates of postage as continued till the reign of queen [323] Anne.[t] After the Restoration a similar office, with some improvements, was established by statute 12 Car. II. c. 35, but the rates of letters were altered, and some farther regulations added, by the statutes 9 Ann. c. 10, 6 Geo. I. c. 21, 26 Geo. II. c. 13, 5 Geo. III. c. 25, 7 Geo. III. c. 50, 41 Geo. III. c. 7, 42 Geo. III. c. 81, 46 Geo. III. c. 92, 2 Wm. IV. c. 15, 4 and 5 Wm. IV. c. 44, and many other statutes, all of which have been repealed and consolidated by the General Post-office Act, 1 Vict. c. 32, and penalties were enacted, in order to confine the carriage of letters to the public office only, except in some few cases: a provision, which is absolutely necessary; for nothing but an exclusive right can support an office of this sort: many rival independent offices would only serve to ruin one another. The privilege of letters coming free of postage, to and from members of parliament, was claimed by the house of commons in 1660, when the first legal settlement of the present post-office was made;[u] but afterwards dropped[v] upon a private assurance from the crown, that this privilege should be allowed the members.[w] And accordingly a warrant was constantly issued to the post-master-general,[x] directing the allowance thereof, to the extent of two ounces in weight: till at length it was expressly confirmed by statute 4 Geo. III. c. 24: which added many new regulations, rendered necessary by the great abuses crept into the practice of franking; whereby the annual amount of franked letters had gradually increased, from 23,600*l.* in the year 1715, to 170,700*l.* in the year 1763;[y] and since this period it has been found necessary further to regulate this privilege, and by an act of her present majesty, 1 Vict. c. 36, it is fully defined and declared, and under it every member of parliament may receive fifteen letters of one ounce weight a day, and send ten, (s. 4) provided that the whole superscription shall be written by such member sending the same, and shall contain his name, together with the name of the post-town from which the same is intended to be sent, and the day, month, and year when the same shall be put into the post-office, the day of the month to be in words at length. There cannot be devised a more eligible method than this of raising money upon the subject: for therein both the government and the people find a mutual benefit; which amounted to the former in the year ending January 1839 to the sum of 1,525,000*l.* The government thus acquires a large revenue: and the people do their business with greater ease, expedition, and cheap- [324] ness, than they would be able to do if no such tax (and of course no such office) existed. And it is believed that this excellent institution, however useful it is to the public, as at present conducted, is yet susceptible of further improvement.

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[m] Rym. *Foed.* 650. 20 Rym. 192.

[n] 20 Rym. 429.

[o] Com. Jour. 28 Mar. 1642.

[p] *Ibid.* 7 Sept. 1644.

Ibid. 21 Mar. 1649.

[r] *Ibid.* 21 Mar. 1649.

[s] Scobell, 358.

[t] Com. Journ, 9 June 1657. Scobell, 511.

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[u] Com. Journ. 17 Dec. 1660.

[v] *Ibid.* 22 Dec. 1660.

[w] *Ibid.* 16 Apr. 1735.

[x] *Ibid.* 26 Feb. 1734.

[y] *Ibid.* 28 Mar. 1764.

VI. Stamps. VI. A sixth branch of the perpetual revenue consists in the stamp duties, which were, in the time of Blackstone, a tax imposed upon all parchment and paper whereon any legal proceedings, or private instruments of almost any nature whatsoever, are written; and, also upon licenses for retailing wines, letting horses to hire, and for certain other purposes; and upon all almanacks, newspapers, advertisements, cards, dice, and pamphlets containing less than six sheets of paper. These imposts are very various, according to the nature of the thing stamped, rising gradually from a penny to thousands of pounds. This is also a tax, which though in some instances it may be heavily felt, by greatly increasing the expence of all mercantile as well as many legal proceedings, yet (if moderately imposed) and properly regulated, is of service to the public in general, by authenticating instruments, and rendering it much more difficult than formerly to forge deeds of any standing; since, as the officers of this branch of the revenue vary their stamps frequently by marks perceptible to none but themselves, a man that would forge a deed of king William's time, must know and be able to counterfeit the stamp of that date also. In France and some other countries the duty is laid on the contract itself, not on the instrument in which it is contained; (as, with us too, besides the stamps on the indentures, a tax was laid by statute 8 Ann. c. 9, of 6*d.* in the pound, upon every apprentice-fee, if it be 50*l.* or under; and 1*s.* in the pound, if it be a greater sum) but this tends to draw the subject into a thousand nice disquisitions and disputes concerning the nature of his contract, and whether taxable or not; in which the farmers of the revenue are sure to have the advantage.[z] The first institution of the stamp duties was by statute 5 & 6 W. & M. c. 21, and they have since in many instances been increased to ten times their original amount.

Alterations since the time of Blackstone.

But many important alterations have taken place in this branch of the revenue since the time of Blackstone. The stamp duties payable on proceedings, as well in the several courts of law and equity as in the admiralty and ecclesiastical courts,[a] as also those on pamphlets[b] and almanacks[c] have been entirely repealed, and those on newspapers, advertisements,[d] cards, and dice,[e] have been considerably reduced; but, on the other hand, the list of articles requiring a stamp has greatly increased, to such a length indeed as to render it's bare enumeration inconvenient. The plan also of affixing the duty according to the amount of the money which passes on every transfer of property; the *ad valorem* stamp, by far the most burdensome and serviceable to the revenue of any, and reprobated by Blackstone in the inconsiderable instance, of apprenticeship indentures, has almost entirely sprung up since the Commentaries were written. The statutes on this fruitful subject of modern legislation are very numerous, the principal one at present, the schedules to which form the most valuable guides to a knowledge of this branch of the revenue is the 55 Geo. III. c. 184.[f] But here there is also a great want of a consolidation of acts in which indeed some progress has[g] recently been made. A stamp duty is now payable, with some exemptions, on all instruments connected with real or personal property, whether *inter vivos*, or of a testamentary nature, and besides the stamp duty payable in many cases on the instrument itself; the *ad valorem* duty rises in amount according to the nature of each case. Agreements, bonds, deeds, receipts, probates, and legacies, policies of insurance, newspapers and advertisements, form the principal items in the list; but there is hardly a transaction of business whether great or small, which can be legal and effectual without benefiting this branch of the revenue.

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[z] Sp. of L. b. xiii. c. 9.

[a] 5 Geo. IV. c. 41.

[b] 3 & 4 Wm. IV. c. 23.

[c] 4 & 5 Wm. IV. c. 57.

[d] 3 & 4 W. IV. c. 23.

[e] 9 Geo. IV. c. 18.

[f] The stamp acts of Geo. III. were, 20 Geo. III. c. 28. 23 Geo. III. c. 58. 29 Geo. III. c. 51. They were consolidated in 1804, 44 Geo. III. c. 98; further augmented in 1808; and in 1815 the general act was passed.

[g] A bill was brought in in session 1836, but was not pressed by the government.

Duty on stage-coaches and post-horses.

Another very productive branch of revenue, which, is usually classed under this head, has arisen since the time of Blackstone, the duty on stage-coaches and post-horses. A weekly account is rendered by each post-master of the number of carriages and horses hired, the duty being payable according to the number of miles travelled, and the number of passengers; a duty is also payable, which promises to be very considerable, by the proprietors of railways for passengers conveyed for hire in carriages drawn by steam, or otherwise.[g] The sixth branch of the revenue produced during the year ending January 5, 1839, the sum of 6,612,927*l.*

VII. The assessed taxes.

VII. A seventh branch is what is now usually called *the assessed taxes*, and by a recent act[h] the boards of stamps and taxes are consolidated, and all the duties arising from these two branches of the revenue are collected and received under the direction of one board of commissioners. The assessed taxes consist of various particulars. 1. The first of which has been usually considered the house [325] and window duties. As early as the Conquest mention is made in domesday-book of fumage or fuage, vulgarly called smoke farthings, which were paid by custom to the king for every chimney in the house. And we read that Edward the black prince (soon after his successes in France) in imitation of the English custom, imposed a tax of a florin upon every hearth in his French dominions.[i] But the first parliamentary establishment of it in England was by statute 13 & 14 Car. II. c. 10, whereby an hereditary revenue of 2*s.* for every hearth, in all houses paying to church and poor, was granted to the king for ever. And, by subsequent statutes for the more regular assessment of this tax, the constable and two other substantial inhabitants of the parish, to be appointed yearly, (or the surveyor, appointed by the crown, together with such constable or other public officer) were, once in every year, empowered to view the inside of every house in the parish. But, upon

1. The house and window duty.

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[g] 2 & 3 Wm. IV. c. 120. 3 & 4 Wm. IV. c. 48. 6 & 7 Wm. IV. c. 45. 6 & 7 Wm. IV. c. 65.

[h] 4 & 5 Wm. IV. c. 60, and see 2 & 3 Wm. IV. c. 120.

[i] Mod. Un. Hist. xxiii. 463. Spelm. Gloss. *tit. Fuage.*

the Revolution, by statute 1 W. & M. st. 1, c. 10, hearth-money was declared to be "not only a great oppression to "the poorer sort, but a badge of slavery upon the whole "people, exposing every man's house to be entered into, "and searched at pleasure, by persons unknown to him; "and therefore, to erect a lasting monument of their ma-"jesties goodness in every house in the kingdom, the duty "of hearth-money was taken away and abolished." This monument of goodness remains among us to this day: but the prospect of it was somewhat darkened, when in six years afterwards by statute 7 Wm. III. c. 18, a tax was laid upon all houses (except cottages) of 2*s.*, afterwards advanced to 3*s. per annum*, and a tax also upon all windows, if they exceeded nine, in such house. Which rates have been from time to time[j] varied, being soon extended to all windows exceeding six; and power is given to surveyors, appointed by the crown, to inspect the outside of houses, and also to pass through any house two days in the year, into any court or yard, to inspect the windows there. A new duty from [326] 6*d.* to 1*s.* in the pound, was also imposed by statutes 18 Geo. III. c. 26, and 19 Geo. III. c. 59, on every dwelling-house inhabited, together with the offices and gardens therewith occupied: which duty, as well as the former, was under the direction of the commissioners of the land-tax. These were further increased and regulated by the 48 Geo. III. c. 55, and the 3 & 4 Wm. 4, c. 39, but the duty on houses was entirely taken off in the year 1834 by stat. 4 Wm. IV. c. 19, and considerable reduction has taken place in the window duty. The 4 Geo. IV. c. 11, reduced the former duties to one-half, and the 4 & 5 Wm. IV. c. 73, exempts farm-houses belonging to farms under 200*l.* a-year from the payment of duties on windows after 5th of April 1834, and some other minor exemptions are also made. But as a general rule, a house having eight windows or lights pays a duty of 16*s.* per annum: nine windows or lights 1*l.* 1*s.*, and so on in an increasing ratio regulated by the number of windows.[k]

Assessed taxes.

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[j] Stat. 20 Geo. II. c. 3. 31 Geo. II. c. 22. 2 Geo. III. c. 8. 6 Geo. III. c. 38, *and* 24 *Geo. III. sess.* 2, *c.* 38.

[k] 48 Geo. III. c. 55. 4 Geo. IV. c. 11. 6 Geo. IV. c. 7. 2 & 3 Wm. IV. c. 113. 4 & 5 Wm. IV. c. 54.

Tax on male servants.

2. The next item of the assessed taxes is a duty of 1*l.* 4*s.* *per annum* for every male servant retained or employed in the several capacities specifically mentioned in the act of parliament, and which almost amount to an universality, except such as are employed in husbandry, trade, or manufactures. A tax of this nature was first imposed by statute 17 Geo. III. c. 39, amended by 19 Geo. III. c. 59, re-enacted by the 48 Geo. III. c. 55, and 52 Geo. III. c. 93, and reduced to its present rate by the 4 Geo. IV. c. 11. By the 4 & 5 Wm. IV. c. 73, s. 3, male servants under eighteen years of age pay no duty. This is also under the management of the commissioners of *stamps and taxes.*

3. Carriages. Hackney coaches.

3. A third branch is the duty arising from licences on carriages. In 1654 two hundred hackney coaches were allowed within London, Westminster, and six miles round, under the direction of the court of aldermen.[l] By statute 13 & 14 Car. II. c. 2, four hundred were licensed; and the money arising thereby was applied to repairing the streets.[m] This number was increased to seven hundred by statute 5 W. & M. c. 22, and the duties vested in the crown: and by the statute 9 Ann. c. 23, and other subsequent statutes for their government,[n] there are many thousand licensed coaches. This revenue is governed by the commissioners of stamps and taxes,[o] and is, in truth, a benefit to the subject; as the expense of it is felt by no individual, [327] and it's necessary regulations have established a competent jurisdiction; and hackney and stage coaches and their drivers have been further regulated by the 1 & 2 Wm. IV. c. 22, and an act of her present majesty, 1 & 2 Vict. s. 79. But the duty on carriages, at first confined to hackney carriages, is now much more extensively levied, and consists of a duty on every carriage, with certain exemptions, whether kept for private use or for hire.[p] An annual duty of 6*l.* is payable for a carriage with four wheels kept for private use. 5*l.* 5*s.* for a four wheeled post chaise, and if drawn only by

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[l] Scobell, 313.

[m] Com. Journ. 14 Feb. 1661.

[n] 10 Ann. c. 19, § 158. 12 Geo. I. c. 15. 7 Geo. III. c. 44. 10 Geo. III. c. 44. 11 Geo. III. c. 24, 28. 12 Geo. III. c. 49.

[o] 1 & 2 Wm. IV. c. 22.

[p] 48 Geo. III. c. 55, and 52 Geo. III. c. 93. 4 Geo. IV. c. 11. 1 Wm. IV. c. 35 2 & 3 Wm. IV. c. 81. 3 & 4 Wm. IV. c. 39.

one horse, 4*l.* 10*s.* A carriage with two wheels pays only 3*l.* 5*s.*, unless drawn by two or more horses, when it pays 4*l.* 10*s.*: but if the price of the carriage has never exceeded 21*l.* it is exempted from duty.[q]

The other branches of the assessed taxes may be briefly mentioned. 4. A duty is payable on horses and mules, whether kept for the purpose of riding or drawing, or hiring, or kept for the purposes of husbandry, which are specified in the statutes passed relative to this subject.[r]

4. Horses.

5. A duty is payable on dogs, which varies from 8*s.* 6*d.* to 1*s.* per annum, according to the value of the dog.[s] 6. There is not only a duty on horses, but a duty on horse-dealers.[t] 7. A seventh branch is the duty on hair powder, which was formerly much more productive than at present.[u] 8. The next is the tax on armorial bearings, a very proper tax,[v] and the 9th and last is the duty payable in respect of killing game, and for game-keepers.[w] The whole annnal amount of all these taxes for the year ending January the 5th 1839, was 3,654,818*l.*

Other branches.

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VIII. The eighth and last branch of the king's extraordinary perpetual revenue is the duty upon offices and pensions; consisting in an annual payment of 1*s.* in the pound (over and above all other duties)[x] out of all salaries, fees, and perquisites, of offices and pensions payable by the crown, exceeding the value of 100*l.* *per annum.* This highly popular taxation was imposed by statute 31 Geo. II. c. 22, and is under the direction of the commissioners of the land-tax.

Duty on offices and pensions.

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[q] 6 & 7 Wm. IV. and 1 Vict. c. 61.

[r] 48 Geo. III. c. 55. 52 Geo. III. c. 93. 4 Geo. IV. c. 11. 1 Wm. IV. c. 35. 3 & 4 Wm. IV. c. 39. 4 & 5 Wm. IV. c. 73, and 5 & 6 Wm. IV. c. 64.

[s] 48 Geo. III. c. 55. 52 Geo. III. c. 93. 3 & 4 Wm. IV. c. 39. 4 & 5 Wm. IV. c. 73.

[t] 43 Geo. III. c. 161. 52 Geo. III. c. 93.

[u] 43 Geo. III. c. 161. 48 Geo. III. c. 55. 52 Geo. III. c. 93.

[v] 48 Geo. III. c. 55. 52 Geo. III. c. 93.

[w] 48 Geo. III. c. 55. 54 Geo. III. c. 141. 55 Geo. III. c. 44.

[x] Previous to this, a deduction of 6*d.* in the pound was charged on all pensions and annuities, and all salaries, fees, and wages of all offices of profit granted by or derived from the crown; in order to pay the interest at the rate of three *per cent.* on one million, which was raised for discharging the debts on the civil list, by statutes 7 Geo. I. st. 1, c. 27. 11 Geo. I. c. 17, and 12 Geo. I. c. 2. This million, being charged on this particular fund, is not considered as any part of the national debt.

Salaries, offices and pensions are now subject to three duties those of 1*s*., 6*d*. and 4*s*. in the pound.[y]

Amount of the revenue.

The clear net produce of these several branches of the revenue, after all charges of collecting and management paid, amounted, in the time of Blackstone, annually to about seven millions and three quarters sterling: besides more than two millions and a quarter raised by the land and malt-tax. The gross income for the year ending January the 5th 1839, arising from all branches of the revenue, amounted to the sum of 44,176,014*l*. How this immense sum is appropriated is next to be considered. And this is, first and principally, to the payment of the interest of the national debt.

Appropriation of the revenue.

First in the payment of the interest of the national debt, what this debt is

In order to take a clear and comprehensive view of the nature of this national debt, it must first be premised, that after the Revolution, when our new connections with Europe introduced a new system of foreign politics, the expenses of the nation, not only in settling the new establishment, but in [328] maintaining long wars, as principals, on the continent, for the security of the Dutch barrier, reducing the French monarchy, settling the Spanish succession, supporting the house of Austria, maintaining the liberties of the Germanic body, attempting to subdue the revolted colonies of America, restoring the house of Bourbon to the throne of France after the first French revolution, and other purposes, increased to an unusual degree: insomuch that it was not thought advisable to raise all the expenses of any one year by taxes to be levied within that year, lest the unaccustomed weight of them should create murmurs among the people. It was therefore the policy of the times to anticipate the revenues of their posterity, by borrowing immense sums for the current service of the state, and to lay no more taxes upon the subject than would suffice to pay the annual interest of the sums so borrowed: by this means converting the principal debt into a new species of property, transferable from one man to another at any time and in any quantity. A system which seems to have had its original in the state of Florence, *A. D.* 1344: which government then owed about 60,000*l*. sterling: and, being unable to pay it, formed the principal into an aggregate sum, called metaphorically a *mount* or

When commenced.

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[y] Mr. J. Coleridge's note.

bank, the shares whereof were transferable like our stocks, with interest at 5 *per cent.* the prices varying according to the exigencies of the state.[z] This policy of the English parliament laid the foundation of what is called the national debt: for a few long annuities created in the reign of Charles II. will hardly deserve that name. The first transaction which assumed the character of a permanent loan was in the year 1693, and the example then set has been so closely followed during the long wars in the reign of queen Anne, and since, that the capital of the national debt (funded and unfunded) amounted at the close of the session in June 1777, to about an hundred and thirty-six millions; at the close of the session in July 1786, to about two hundred and thirty-nine millions, and on the 5th of January, 1838, the total funded debt was 764,704,057*l.*, and the unfunded debt upwards of twenty-eight millions more: to pay the interest of which, the extraordinary revenues just now enumerated are in the first place mortgaged, and made perpetual by parliament. Perpetual, I say; but still redeemable by the same authority that imposed them: which, if at any time can pay off the capital will abolish those taxes which are raised to discharge the interest. This interest for the year ending January the 5th, 1838, amounted to the sum of 24,215,779*l.*, and certain terminable annuities to the sum of 4,195,745*l.*, the charges of management, which have of late been much reduced, being 132,482*l.*, a total of 29,480,694*l.* being nearly one-fourth of the amount of the principal debt in the time of Blackstone.[a]

Its amount.

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Advantages and disadvantages of the debt.

By this means the quantity of property in the kingdom is greatly increased in idea, compared with former times: yet, if we coolly consider it, not at all increased in reality. We may boast of large fortunes, and quantities of money in the funds. But where does this money exist? It exists only in name, in paper, in public faith, in parliamentary security: and that is undoubtedly sufficient for the creditors of the public to rely on. But then what is the pledge, which the public faith has pawned for the security of these debts?

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[z] *Pro tempore, pro spe, pro commodo, minuitur eorum pretium atque augescit.* Aretin. See Mod. Un. Hist. xxxvi. 116.

[a] See Parl. Paper, No. 528, sess. 1838.

The land, the trade, and the personal industry of the subject; from which the money must arise that supplies the several taxes. In these therefore, and these only, the property of the public creditors does really and intrinsically exist: and of course the land, the trade, and the personal industry of individuals, are diminished in their true value just so much as they are pledged to answer. If A.'s income amounts to 100*l.* *per annum;* and he is so far indebted to B., that he pays him 50*l.* *per annum*, for his interest; one-half of the value of A.'s property is transferred to B. the creditor. The creditor's property exists in the demand which he has upon the debtor, and no where else; and the debtor is only a trustee to his creditor for one-half of the value of his income. In short, the property of a creditor of the public consists in a certain portion of the national taxes: by how much therefore he is the richer, by so much the nation, which pays these taxes, is the poorer.

The only advantage that can result to a nation from public debts, is the increase of circulation by multiplying the cash of the kingdom, and creating a new species of currency, assignable at any time and in any quantity; always therefore ready to be employed in any beneficial undertaking, by means of this its transferable quality; and yet producing some profit even when it lies idle and unemployed. A certain proportion of debt seems therefore to be highly useful to a trading people; but what that proportion is, it is not for me
[330] to determine. Thus much is indisputably certain, that the present magnitude of our national incumbrances very far exceeds all calculations of commercial benefit, and is productive of the greatest inconveniences. For, first, the enormous taxes, that are raised upon the necessaries of life for the payment of the interest of this debt, are a hurt both to trade and manufactures, by raising the price as well of the artificer's subsistence, as of the raw material, and of course, in a much greater proportion, the price of the commodity itself. Nay, the very increase of paper-circulation itself, when extended beyond what is requisite for commerce or foreign exchange, has a natural tendency to increase the price of provisions as well as of all other merchandize. For, as its effect is to multiply the cash of the kingdom, and this

to such an extent that much must remain unemployed, that cash (which is the universal measure of the respective values of all other commodities) must necessarily sink in its own value,[b] and every thing grow comparatively dearer. Secondly, if part of this debt be owing to foreigners, either they draw out of the kingdom annually a considerable quantity of specie for the interest; or else it is made an argument to grant them unreasonable privileges, in order to induce them to reside here. Thirdly, if the whole be owing to subjects only, it is then charging the active and industrious subject, who pays his share of the taxes, to maintain the indolent and idle creditor who receives them. Lastly, and principally, it weakens the internal strength of a state, by anticipating those resources which should be reserved to defend it in case of necessity. The interest we now pay for our debts would be nearly sufficient to maintain any war, that any national motives could require. And if our ancestors in king William's time had annually paid, so long as their exigencies lasted, even a less sum than we now annually raise upon their accounts, they would in the time of war have borne no greater burdens, than they have bequeathed to and settled upon their posterity in time of peace; and might have been eased the instant the exigence was over.

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The produce of the taxes were formerly separate funds.

The respective produces of the several taxes beforementioned were originally separate and distinct funds; being securities for the sums advanced on each several tax, and for them only. But at last it became necessary, in order to avoid confusion, as they multiplied yearly, to reduce the number of these separate funds, by uniting and blending them together; superadding the faith of parliament for the general security of the whole. So that there were only three capital funds of any account, the *aggregate* fund, and the *general* fund, so called from such union and addition; and the *South Sea* fund, being the produce of the taxes appropriated to pay the interest of such part of the national debt as was advanced by that company and its annuitants. And by the statute 27 Geo. III. c. 13, these three funds have been united together, and form the *consolidated fund*, and the

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[b] See page 287.

Consolidated fund.

consolidated fund of England and Ireland have since been united by the 56 Geo. III. c. 98. This last fund has become the great national security, and its whole produce, thus aggregated, is liable to pay such interest or annuities as were formerly charged upon each distinct fund; the faith of the legislature being moreover engaged to supply any casual deficiencies.

The surplus of the annual revenue after answering charges were directed to form a sinking fund.

The customs, excises, and other taxes, which are to support these funds, depending on contingencies, upon exports, imports, and consumptions, must necessarily be of a very uncertain amount; but though some of them have proved unproductive, and others deficient, the sum total hath almost always been considerably more than was sufficient to answer the charge upon them. The surplusses therefore of the three great national funds, the aggregate, general, and South Sea funds, over and above the interest and annuities charged upon them, in the year 1716, were directed by statute 3 Geo. I. c. 7, to be carried together, and to attend the disposition of parliament; and was usually denominated the *sinking* fund, because originally destined to sink and lower the national debt. To this was added many other entire duties, granted in subsequent years; and the annual interest of the sums borrowed on their respective credits was charged on and payable out of the produce of the sinking fund. However the neat surplusses and savings, after all deductions paid, amounted annually to a very considerable sum. For as the interest on the national debt has been at several times reduced, (by the consent of the proprietors, who had [332] their option either to lower their interest or be paid their principal) the savings from the appropriated revenues came at length to be extremely large. And in the year 1786 by statute 26 Geo. III. c. 31, a plan was established for the gradual extinction of the national debt. This was formed to a certain extent on the act of Geo. I., and it was intended by raising an estimated surplus of 900,000*l.* in the revenue to one million, by the imposition of new taxes, and vesting this sum annually in commissioners to form a fund which might be appropriated to this highly desirable object; and had the operation of this fund been confined to the simple and legitimate object proposed at its first adop-

1716.

tion, it would have been highly beneficial; but the fallacy of the plan consisted in the continuance and enlargement of its operation during periods when no surplus revenue existed, and where, for the very purpose of maintaining the show of thus redeeming the national incumbrances, it became necessary to augment the public debts to a disadvantage. This is now universally allowed: and by the act 10 Geo. IV. c. 27, which came into operation on the 5th of July, 1829, it is enacted that the sum thenceforth annually applicable to the reduction of the national debt, shall be the sum which shall appear to be the amount of the whole actual annual surplus revenue beyond the expenditure of the United Kingdom. This sinking fund is the last resort of the nation; its only domestic resource on which must chiefly depend all the hopes we can entertain of ever discharging or moderating our incumbrances. And therefore the prudent and steady application of the sums now arising from this fund, is a point of the utmost importance, and well worthy the serious attention of parliament; which was thereby enabled, in the year 1765, to reduce above two millions sterling of the public debt: and several additional millions in several succeeding years. The sums received by the commissioners under the 10 Geo. IV. c. 27, towards the reduction of the debt in the year ending January the 5th 1838 were, sinking fund 1,300,610*l.* 7*s.* 9*d.*, donations and bequests 7,238*l.* 5*s.* 10*d.*

The consolidated fund is mortgaged for the maintenance of the royal household and civil list.

But, before any part of the consolidated fund, (the surplusses whereof are one of the chief ingredients that form the sinking fund) can be applied to diminish the principal of the public debt, it stands mortgaged by parliament to raise an annual sum for the maintenance of the king's household and the civil list. For this purpose, in the reigns, preceding that of George III., the produce of certain branches of the excise and customs, the post-office, the duty on wine licenses, the revenues of the remaining crown lands, the profits arising from courts of justice, (which articles include all the hereditary revenues of the crown) and also a clear annuity of 120,000*l.* in money, were settled on the king for life, for the support of his majesty's household, and the

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History of the royal allowances and civil list.

honour and dignity of the crown. And, as the amount of these several branches was uncertain, (though in the reign of Geo. II. they were computed to have sometimes raised almost a million) if they did not arise annually to 800,000*l.* the parliament engaged to make up the deficiency. But his majesty George the third having, soon after his accession, spontaneously signified his consent, that his own hereditary revenues might be so disposed of as might best conduce to the utility and satisfaction of the public; and having graciously accepted the limited sum of 800,000*l.* *per annum* for the support of his civil list; the said hereditary and other revenues were carried into and made a part of the aggregate fund, and the aggregate fund was charged[c] with the payment of the whole annuity to the crown of 800,000*l.* which, being found insufficient, was increased in 1777 to 900,000*l.* *per annum.* Hereby the revenues themselves, being put under the same care and management as the other branches of the public patrimony, produce more and are better collected than heretofore; and the public was still a gainer of near 100,000*l.* *per annum* by this disinterested conduct of his majesty.

Their amount in the reigns of Geo. III. IV. Wm. IV. and Victoria.

On the accession of George IV. he also placed his interest in the hereditary revenues of the crown at the disposal of the house of commons, and they were carried to the consolidated fund for his life, 1 Geo. IV. c. 1; and by the same statute, a revenue of 850,000*l.* in England, and 207,000*l.* in Ireland, was granted to his majesty for life. On the accession of William IV. the hereditary revenues of the crown were also surrendered in the same manner, and the clear yearly sum of 510,000*l.* was directed to be paid out of the consolidated fund, for the support of his majesty's household and of the honour and dignity of the crown, 1 Wm. IV. c. 25. And by the same statute, the civil list was relieved from those expenses which had no immediate connection with the royal dignity, or personal comfort of the sovereign, but which belonged rather to the civil government of the state. It was also provided that if the civil list ever exceeded the sum of 539,000*l.*, the particulars and cause of such excess was to be laid before parliament. On the accession of her present majesty, a similar course was pursued in all particulars. By the 1 Vict. c. 2, the hereditary revenues of the crown were carried to the consolidated fund during the life of her majesty, (s. 2.) and the yearly sum of 385,000*l.* is to be paid out of the consolidated fund, for the support of her majesty's household, and the honour and dignity of the crown; and by s. 10 it is enacted that whenever the total charge on the civil list shall in any year exceed the sum of 400,000*l.*, an account of the particulars shall be laid before parliament.

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[c] Stat. 1 Geo. III. c. 1.

[334] The expenses defrayed by the civil list were those that in any shape related to civil government; as, the expenses of the royal household; the revenues allotted to the judges, previous to the year 1758; all salaries to officers of state, and every of the king's servants; the appointments to foreign ambassadors; the maintenance of the queen and royal family; the king's private expenses, or privy purse; and other very numerous outgoings, as secret service money, pensions, and other bounties: which sometimes have so far exceeded the revenues appointed for that purpose, that application has been made to parliament to discharge the debts contracted on the civil list; as particularly in 1724, when one million was granted for that purpose by the statute 11 Geo. I. c. 17, and in 1769 and 1777, when half a million and 600,000*l.* were appropriated to the like uses, by the statutes 9 Geo. III. c. 34, and 17 Geo. III. c. 47.

But at the commencement of the last reign an alteration as to this was made, and the revenues of the judges, the appointments to the foreign ambassadors, and the maintenance of the royal family,[c] were charged on the consolidated fund,to which is now added the secret service money and the only charges on the allowance to her present majesty, are the following:—

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[c] The allowances to the various branches of the royal family were formerly charged on the civil list, but they are now charged on the consolidated fund. 1 Wm. IV. c. 25, and 1 & 2 Wm. IV. c. 20. These allowances in the year 1838, amounted to the sum of 278,857*l.* By an act of the present queen, 1 & 2 Vict. c. 8, her majesty is enabled to grant an annual sum of 30,000*l.* to her royal highness the duchess of Kent, charged on this fund.

		£
First class: - -	For her majesty's privy purse	60,000
Second class: -	Salaries of her majesty's household and retired allowances -	131,260
Third class: -	Expenses of her majesty's household - - - -	172,500
Fourth class: -	Royal bounty, alms, and special services - - - -	13,200
Fifth class: - -	Pensions to the extent of 1,200*l.* per annum.[f]	
Sixth class: -	Unappropriated monies - -	8,040
		£385,000

The nature of the civil list.

The civil list is indeed properly the whole of the king's revenue in his own distinct capacity; the rest being rather the revenue of the public, or its creditors, though collected and distributed again, in the name and by the officers of the crown: it now standing in the same place, as the hereditary income did formerly; and, as that has gradually diminished, the parliamentary appointments have increased. The whole revenue of queen Elizabeth did not amount to more than 600,000*l.* a-year:[g] that of king Charles I. was[h] 800,000*l.* and the revenue voted for king Charles II. was[i] 1,200,000*l.* though complaints were made (in the first years at least) that it did not amount to so much.[j] But it must be observed, that under these sums were included all manner of public expenses; among which lord Clarendon in his speech to the parliament computed, that the charge of the navy and land forces amounted annually to 800,000*l.* which was ten times more than before the former troubles.[k] The same revenue, [335] subject to the same charges, was settled on king James II.:[l] but by the increase of trade, and more frugal management, it amounted on an average to a million and a half *per annum*, (besides other additional customs, granted by parliament,[m] which produced an annual revenue of 400,000*l.*) out of which his fleet and army were maintained at the yearly expense of[n] 1,100,000*l.* After the Revolution, when the parliament took into its own hands the annual support of the forces both maritime and military, a civil list revenue was settled on the new king and queen, amounting with the hereditary duties, to 700,000*l.* *per annum,*[o] and the same was continued to queen Anne and king George I.[p] That of king George II. we have seen, was nominally augmented to[q] 800,000*l.*, and in fact was considerably more: and that of George III. was avowedly increased to the limited sum of 900,000*l.* That of George IV. was further increased to the sum of 1,057,000*l.* That of William IV. was settled at 510,000*l.* and that of her present majesty at 385,000*l.*, but with respect to our last and our present sovereign the charges, as we have already seen, are much lighter. And upon the whole it is doubtless much better for the crown, and also for the people, to have the revenue settled upon the modern footing rather than the ancient. For the crown; because it is more certain, and collected with greater ease: for the people; because they are now delivered from the feudal hardships, and other odious branches of the prerogative. And though complaints have sometimes been made of the increase of the civil list, yet if we consider the sums that have been formerly granted, the limited extent under which it is now established, the revenues and prerogatives given up in lieu of it by the crown, and (above all) the diminution of the value of money compared with what it was worth in the last century, we must acknowledge these complaints to be void of any rational foundation: and that it is impossible to support that dignity, which a king of Great Britain should maintain, with an income in any degree less than what is now established by parliament.

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[f] This item has been much reduced under the 1 & 2 Vict. c. 2.

[g] Lord Clar. continuation, 163.

[h] Com. Journ. 4 Sept. 1660.

[i] *Ibid.*

[j] *Ibid.* 4 Jun. 1663. Lord Clar. *ibid.*

[k] Lord Clar. 165.

[l] Stat. 1, Jac. II. c. 1.

[m] *Ibid.* c. 3 & 4.

Advantages of the present mode of managing the royal revenues.

This finishes our inquiries into the fiscal prerogatives of the king; or his revenue, both ordinary and extraordinary. We have therefore now chalked out all the principal outlines [336] of this vast title of the law, the supreme executive magistrate, or the king's majesty, considered in his several capa-

General reflections on the royal prerogative.

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[n] Com. Journ. 1 Mar. 20 Mar. 1688.

[o] *Ibid.* 14 Mar. 1701.

[p] Com. Journ. 17 Mar. 1701. 11 Aug. 1714.

[q] Stat. 1 Geo. II. c. I.

cities and points of view. But, before we entirely dismiss this subject, it may not be improper to take a short comparative review of the power of the executive magistrate, or prerogative of the crown, as it stood in former days, and as it stands at present. And we cannot but observe, that most of the laws for ascertaining, limiting, and restraining this prerogative have been made within the compass of little more than a century past; from the petition of right in 3 Car. I. to the present time. So that the powers of the crown are now to all appearance greatly curtailed and diminished since the reign of king James the first: particularly, by the abolition of the star-chamber and high commission courts in the reign of Charles the first, and by the disclaiming of martial law, and the power of levying taxes on the subject, by the same prince: by the disuse of forest laws for a century past: and by the many excellent provisions enacted under Charles the second; especially the abolition of military tenures, purveyance, and pre-emption; the *habeas corpus* act; and the act to prevent the discontinuance of parliaments for above three years; and, since the Revolution, by the strong and emphatical words in which our liberties are asserted in the bill of rights, and act of settlement; by the act for triennial, since turned into septennial, elections; by the exclusion of certain officers from the house of commons; by rendering the seats of the judges permanent, and their salaries liberal and independent; by restraining the king's pardon from obstructing parliamentary impeachments; and above all by the passing of the reform act. Besides all this, if we consider how the crown is impoverished and stripped of all its ancient revenues, so that it must greatly rely on the liberality of parliament for its necessary support and maintenance, we may perhaps be led to think, that the balance is inclined pretty strongly to the popular scale, and that the executive magistrate has neither independence nor power enough left to form that check upon the lords and commons, which the founders of our constitution intended.

The former and present power of the crown.

Benefits which the crown enjoys.

But, on the other hand, it is to be considered, that every prince, in the first parliament after his accession, has by [337] long usage a truly royal addition to his hereditary revenue settled upon him for his life; and has never any occasion to apply to parliament for supplies, but upon some public necessity of the whole realm. This restores to him that constitutional independence, which at his first accession seems, it must be owned, to be wanting. And then, with regard to power, we may find perhaps that the hands of government are at least sufficiently strengthened; and that an English monarch is now in no danger of being overborne by either the nobility or the people. The instruments of power are not perhaps so open and avowed as they formerly were, and therefore are the less liable to jealous and invidious reflections; but they are not the weaker upon that account. In short, our national debt and taxes (besides the inconveniences before mentioned) have also in their natural consequences thrown such a weight of power into the executive scale of government, as we cannot think was intended by our patriot ancestors; who gloriously struggled for the abolition of the then formidable parts of the prerogative, and by an unaccountable want of foresight established this system in their stead. The entire collection and management of so vast a revenue, being placed in the hands of the crown, have given rise to such a multitude of new officers created by and removable at the royal pleasure, that they have extended the influence of government to every corner of the nation. Witness the commissioners and the multitude of dependents on the customs, in every port of the kingdom; the commissioners of excise, and their numerous subalterns, in every inland district; the post-masters, and their servants, planted in every town, and upon every public road; the commissioners of stamps and taxes, and their distributors, which are full as scattered and full as numerous; and also the commissioners of the land-tax; all which, although, as we have seen, they have been[r] recently lessened in number, are either mediately or immediately appointed by the crown, and removable at pleasure without any reason assigned; these, it requires but very little penetration to [336*] see, must give that power, on which they depend for subsistence, an influence most amazingly extensive. To this may be added the frequent opportunities of conferring particular obligations, by preference in loans, subscriptions,

Its great patronage.

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[r] See *ante* p. 340.

tickets, remittances, and other money transactions, which will greatly increase this influence; and that over those persons whose attachment, on account of their wealth, is frequently the most desirable. All this is the natural, though perhaps the unforeseen consequence of erecting our funds of credit, and to support them, establishing our present perpetual taxes: the whole of which is entirely new since the Restoration in 1660; and by far the greatest part since the Revolution in 1688. And the same may be said with regard to the officers in our numerous army, and the places which the army has created. All which put together give the executive power so persuasive an energy with respect to the persons themselves, and so prevailing an interest with their friends and families, as will amply make amends for the loss of external prerogative.

The army.

But, though this profusion of offices should have no effect on individuals, there is still another newly acquired branch of power; and that is, not the influence only, but the force of a disciplined army: paid indeed ultimately by the people, but immediately by the crown: raised by the crown, officered by the crown, commanded by he crown. They are kept on foot it is true only from year to year, and that by the power of parliament; but during that year they must by the nature of our constitution, if raised at all, be at the absolute disposal of the crown. And there need but few words to demonstrate how great a trust is thereby reposed in the prince by his people. A trust, that is more than equivalant to a thousand little troublesome prerogatives.

The treasury.

Add to all this, that besides the civil list, the immense revenue of upwards of forty-four millions sterling, which is annually paid to the creditors of the public, or carried to the sinking fund, is first deposited in the royal exchequer, and [337*] thence issued out to the respective offices of payment. This revenue the people can never refuse to raise, because it is made perpetual by act of parliament: which also, when well considered, will appear to be a trust of great delicacy and high importance.

Concluding reflections.

Upon the whole therefore I think it is clear, that, whatever may have become of the *nominal*, the *real* power of the crown has not been too far weakened by any transactions in the last century. Much is indeed given up; but much is also acquired. The stern commands of prerogative have yielded to the milder voice of influence: the slavish and exploded doctrine of non-resistance has given way to a military establishment by law; and to the disuse of parliaments has succeeded a parliamentary trust of an immense perpetual revenue: the management of which, more especially of late years, has been open to public and parliamentary scrutiny, and the fullest inquiry allowed as to its appropriation. When indeed, by the free operation of the sinking fund, our national debts shall be lessened; although little can be now hoped from this; when the posture of foreign affairs, and the universal introduction of a well-planned and national militia, will suffer our formidable army to be thinned and regulated; and when (in consequence of all) our taxes shall be gradually reduced; this adventitious power of the crown will slowly and imperceptibly diminish, as it slowly and imperceptibly rose. But till that shall happen, it will be our especial duty, as good subjects and good Englishmen, to reverence the crown, and yet guard against corrupt and servile influence from those who are intrusted with its authority; to be loyal, yet free; obedient, and yet independent; and, above every thing, to hope that we may long, very long, continue to be governed by sovereigns, who, like unto her present majesty and many of her illustrious ancestors, in all those public acts that have personally proceeded from themselves, have manifested the highest veneration for the free constitution of Britain; have already in more than one instance remarkably strengthened its outworks; and will therefore never harbour a thought, or adopt a persuasion, in any the remotest degree detrimental to public liberty.

CHAPTER THE NINTH.

OF SUBORDINATE MAGISTRATES.

[338] Magistrates either supreme or subordinate. IN a former chapter[a] we distinguished magistrates into two kinds: supreme, or those in whom the sovereign power of the state resides; and subordinate, or those who act in an inferior secondary sphere. We have hitherto considered the former kind only; namely, the supreme legislative power or parliament, and the supreme executive power, which is the king; and are now to proceed to inquire into the rights and duties of the principal subordinate magistrates.

What will be treated of in this chapter. And herein we are not to investigate the powers and duties of her majesty's great officers of state, the lord treasurer, lord chamberlain, the principal secretaries, or the like; because I do not know that they are in that capacity in any considerable degree the objects of our laws, or have any very important share of magistracy conferred upon them: except that the secretaries of state are allowed the power of commitment, in order to bring offenders to trial.[b] Neither shall I here treat of the office and authority of the lord chancellor, or the other judges of the superior courts of justice. Nor shall I enter into any minute disquisitions, with regard to the rights and dignities of mayors [339] and aldermen, or other magistrates of particular corporations; because these are mere private and strictly municipal rights, depending entirely upon the domestic constitution of their respective franchises. But the magistrates and officers, whose rights and duties it will be proper in this chapter to consider, are such as are generally in use, and have a jurisdiction and authority dispersedly throughout the kingdom: which are, principally, sheriffs; coroners; justices of the peace; constables; surveyors of highways; and overseers of the poor. In treating of all which I shall inquire into, first, their antiquity and original; next, the manner in which they are appointed and may be removed; and lastly, their rights and duties. And first of sheriffs,

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[a] Ch. 2, page 141.

[b] 1 Leon. 70. 2 Leon. 175. Comb. 143. 5 Mod, 84. Salk. 347. Carth. 291.

I. The sheriff.

I. The sheriff is an officer of very great antiquity in this kingdom, his name being derived from two Saxon words, ꞅcıꞃe ᵹeꞃeꝼa, the reeve, bailiff, or officer of the shire. He is called in Latin *vice-comes*, as being the deputy of the earl or *comes:* to whom the custody of the shire is said to have been committed at the first division of this kingdom into counties. But the earls in process of time, by reason of their high employments and attendance on the king's person, not being able to transact the business of the county, were delivered of that burden;[c] reserving to themselves the honour, but the labour was laid on the sheriff. So that now the sheriff does all the king's business in the county; and though he be still called *vice-comes*, yet he is entirely independent of, and not subject to the earl; the king by his warrant[d] committing *custodiam comitatus* to the sheriff, and him alone.

How chosen

Formerly elected by the people.

Sheriffs were formerly chosen by the inhabitants of the several counties. In confirmation of which it was ordained by statute 28 Edw. I. c. 8, that the people should have election of sheriffs in every shire, where the shrievalty is not of inheritance. For anciently in some counties the sheriffs were hereditary; as I apprehend they were in Scotland till the statute 20 Geo. II. c. 43; and still continue in the county of Westmorland to this day: the city [340] of London having also the inheritance of the shrievalty of Middlesex vested in their body by charter.[e] The reason of these popular elections is assigned in the same statute, c. 13. "that the commons might choose such as would not "be a burthen to them." And herein appears plainly a strong trace of the democratical part of our constitution; in which form of government it is an indispensable requisite, that the people should choose their own magistrates.[f] This election was, in all probability, not absolutely vested in the commons, but required the royal approbation. For, in the Gothic constitution, the judges of the county courts (which office is executed by our sheriff) were elected by the people, but confirmed by the king: and the form of their election was thus managed: the people, or *incolæ territorii*, chose *twelve* electors, and they nominated *three* persons, *ex quibus rex unum confirmabat.*[g] But with us in England these popular elections, growing tumultuous, were put an end to by the statute 9 Edw. II. st. 2, which enacted, that the sheriffs should from thenceforth be assigned by the chancellor, treasurer, and the judges; as being persons in whom the same trust might with confidence be reposed. By statutes 14 Edw. III. c. 7, 23 Hen. VI. c. 7, and 21 Hen. VIII. c. 20, the chancellor, treasurer, president of the king's council, *chief* justices, and *chief* baron, are to make this election; and that on the morrow of All Souls in the exchequer. And the king's letters patent, appointing the new sheriffs, used commonly to bear date the sixth day of November.[h] The statute of Cambridge, 12 Ric. II. c. 2, ordains, that the chancellor, treasurer, keeper of the privy seal, steward of the king's house, the king's chamberlain, clerk of the rolls, the justices of the one bench and the other, barons of the exchequer, and all other that shall be called to ordain, name, or make justices of the peace, *sheriffs*, and other officers of the king, shall be sworn to act indifferently, and to appoint no man that sueth either privily or openly to be put in office, but such only as they shall judge to be the best and most sufficient. And

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[c] Dalton of sheriffs, c. 1.

[d] 3 & 4 Wm. IV. c. 99, s. 3.

[e] 3 Rep. 72.

Now chosen by the judges.

[341] the custom now is (and has been at least ever since the time of Fortescue,[i] who was chief justice and chancellor to Henry the sixth) that all the judges, together with the other great officers and privy counsellors, meet in the exchequer on the morrow of All Souls yearly, (which day is now altered to the morrow of St. Martin by the statute

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[f] Montesq. Sp. L. b. 2. c. 2.
Stiernh. *de jure Goth, l.* x. c. 3.

[h] Stat. 12 Edw. IV. c. 1.

[i] *de L. L. c.* 24.

24 Geo. II. c. 48, and then and there the judges propose three persons, to be reported (if approved of) to the king, who afterwards appoints one of them to be sheriff. And where the appointment is legal and there is no sufficient excuse for not accepting it, it is a misdemeanor to refuse to serve.[j] The sheriff is now appointed by virtue of a royal warrant, the form of which is given in the schedule to the 3 & 4 Wm. IV. c. 99.

This custom, of the twelve (now increased by the 1 Wm. IV. c. 70, s. 1, to *fifteen*) judges proposing *three* persons, seems borrowed from the Gothic constitution before-mentioned; with this difference, that among the Goths the twelve nominors were first elected by the people themselves. And this usage of ours at its first introduction, I am apt to believe, was founded upon some statute, though not now to be found among our printed laws: first, because it is materially different from the direction of all the statutes before-mentioned: which it is hard to conceive that the judges would have countenanced by their concurrence, or that Fortescue would have inserted in his book, unless by the authority of some statute: and also, because a statute is expressly referred to in the record, which sir Edward Coke tells us[k] he transcribed from the council book of 3rd March, 34 Hen. VI. and which is in substance as follows. The king had of his own authority appointed a man sheriff of Lincolnshire, which office he refused to take upon him: whereupon the opinions of the judges were taken, what should be done in this behalf. And the two chief justices, sir John Fortescue and sir John Prisot, delivered the unanimous opinion of them all; "that the king did an "error when he made a person sheriff, that was not chosen "and presented to him according to the *statute;* that the "person refusing was liable to no fine for disobedience, as "if he had been one of the *three* persons chosen according "to the tenure of the *statute;* that they would advise the "king to have recourse to the *three* persons that were "chosen according to the *statute,* or that some other thrifty

Whether the king may appoint sheriffs of his own authority.

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[j] *Rex* v. *Woodrow,* 2 T. R. 731. By the Militia Act, 42 Geo. III. c. 90, s. 172, no person being an officer of the militia shall be compelled to serve the office of sheriff.

[k] 2 Inst. 559.

[342] "man be intreated to occupy the office for this year; and "that, the next year, to eschew such inconveniences, the "order of the *statute* in this behalf made be observed." But notwithstanding this unanimous resolution of all the judges of England, thus entered in the council book, and the statute 34 & 35 Hen. VIII. c. 26, s. 61, which expressly recognizes this to be the law of the land, some of our writers[l] have affirmed, that the king, by his prerogative, may name whom he pleases to be sheriff, whether chosen by the judges or no. This is grounded on a very particular case in the fifth year of queen Elizabeth, when, by reason of the plague, there was no Michaelmas term kept at Westminster; so that the judges could not meet there *in crastino animarum* to nominate the sheriffs: whereupon the queen named them herself, without such previous assembly, appointing for the most part one of the two remaining in the last year's list.[m] And this case, thus circumstanced, is the only authority in our books for the making these extraordinary sheriffs. It is true, the reporter adds, that it was held that the queen by her prerogative might make a sheriff without the election of the judges, *non obstante aliquo statuto in contrarium:* but the doctrine of *non obstante's*, which sets the prerogative above the laws, was effectually demolished by the bill of rights at the Revolution, and abdicated Westminster-hall when king James abdicated the kingdom. However, it must be acknowledged, that the practice of occasionally naming what are called pocket-sheriffs, that is to say, a person not one of the three nominated in the exchequer, by the sole authority of the crown, hath uniformly continued to the reign of her present majesty; in which, I believe, few (if any) compulsory instances have occurred; and this prerogative has been recently exercised by the lord lieutenant of Ireland to some extent.[n]

Sheriffs continue in office one year.

Sheriffs, by virtue of several old statutes, are to continue in their office no longer than one year: and yet it hath been said[o] that a sheriff may be appointed *durante bene placito*, or during the king's pleasure; and so is the form of the royal warrant.[p] Therefore, till a new sheriff be named, his office cannot be determined, unless by his own death, or the demise of the king: in which last case it was usual for the successor to send a new writ to the old sheriff:[q] but now by statute 1 Ann. st. 1, c. 8, all officers [343] appointed by the preceding king may hold their offices, for six months after the king's demise, unless sooner displaced by the successor. We may farther observe, that by statute 1 Ric. II. c. 11, no man that has served the office of sheriff for one year, can be compelled to serve the same again within three years after. No person chosen a sheriff of a city or town shall thereby be liable to make the declaration in the 9 Geo. IV. c. 17.[r] A Jew, therefore, may hold this office.[s]

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[l] Jenkins, 229.

[m] Dyer, 225.

[n] See a full discussion on the point in the House of Lords, Hans. Deb. sess. 1838, vol. 41, p. 990, et seq.

[o] 4 Rep. 32.

The duties of the sheriff.

We shall find it is of the utmost importance to have the sheriff appointed according to law, when we consider his power and duty. These are either as a judge, as the keeper of the king's peace, as a ministerial officer of the superior courts of justice, or as the king's bailiff.

His judicial capacity.

In his judicial capacity he has always had to hear and determine all causes of forty shillings value and under, in this county court, and by a late act this jurisdiction is extended to issues in actions not exceeding *20l.* by virtue of a writ of trial granted for the purpose by a judge of one of the supreme courts,[t] and he has also a judicial power in divers other civil cases.[u] He is likewise to decide the elections of knights of the shire, (subject to the control of the house of commons) of coroners, and of verderors; and to return such as he shall determine to be duly elected. He had formerly to judge of the qualification of voters, but this duty, as we have seen,[v] no longer devolves on him.

Keeper of the king's peace.

As the keeper of the king's peace, both by common law and special commission, he is the first man in the county, and superior in rank to any nobleman therein, during his office.[u] He may apprehend, and commit to prison, all persons who break the peace, or attempt to break it; and may bind any one in a recognizance to keep the king's peace. He may, and is bound *ex officio* to pursue, and take all traitors, murderers, felons, and other misdoers, and commit them to gaol for safe custody. He is also to defend his county against any of the king's enemies when they come into the land: and for this purpose, as well for keeping the peace and pursuing felons, he may command all the people of his county to attend him: which is called the *posse comitatus*, or power of the county:[v] and this summons every person above fifteen years old, and under the degree of a peer, is bound to attend upon warning,[w] [344] under pain of fine and imprisonment.[x] But though the sheriff is thus the principal conservator of the peace in his county, yet by the express direction of the great charter,[y] he, together with the constable, coroner, and certain other officers of the king, are forbidden to hold any pleas of the crown, or, in other words, to try any criminal offence. For it would be highly unbecoming, that the executioners of justice should be also the judges; should impose, as well as levy, fines, and amercements; should one day condemn a man to death, and personally execute him the next. Neither may he act as an ordinary justice of the peace during the time of his office:[z] for this would be equally inconsistent; he being in many respects the servant of the justices.

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[p] Dalt. of sheriffs, 8. 3 & 4 Wm. IV. c. 99.

[q] *Ibid.* 7.

[r] 5 & 6 Wm. IV. c. 28.

[s] See *ante* p. 241, n. (*l*). This declaration is to be made "on the true faith of a Christian." See the *Queen* v. *Humphreys*, 3 Nev. & P. 681.

[t] 3 & 4 Wm. IV. c. 42, ss. 17, 18, 19.

[u] Dalt. c. 4.

[v] See *ante* p. 188.

He is bound to execute all process.

In his ministerial capacity the sheriff is bound to execute all process issuing from the king's courts of justice. In the commencement of civil causes, he is to serve the writ, to arrest, and to take bail; when the cause comes to trial, he must summon and return the jury; when it is determined, he must see the judgment of the court carried into execution. In criminal matters, he also arrests and imprisons, he returns the jury, he has the custody of the delinquent, and he executes the sentence of the court, though it extend to death itself.

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[w] 1 Roll. Rep. 237.

[x] Dalt. c. 95.

[y] Lamb. Eiren. 315.

[z] Stat. 2 Hen. V. c. 8.

[a] *cap.* 17.

[b] Stat. 1 Mar. st. 2, c. 8.

He is the king's bailiff

As the king's bailiff, it is his business to preserve the rights of the king within his bailiwick; for so his county is frequently called in the writs: a word introduced by the princes of the Norman line; in imitation of the French, whose territory is divided into bailiwicks, as that of England into counties.[c] He must seise to the king's use all lands devolved to the crown by attainder or escheat; must levy all fines and forfeitures; must seise and keep all waifs, wrecks, estrays, and the like,[d] unless they be granted to some subject; and he had also to collect the king's rents within the bailiwick, if commanded by process from the exchequer,[e] but he is relieved from this duty by a recent statute[f] already alluded to, and which, to a certain extent, facilitates the execution of his office.

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His officers.

To execute these various offices, the sheriff has under him many inferior officers; an under-sheriff, bailiffs, and gaolers; who must neither buy, sell, nor farm their offices, on forfeiture of 500*l.*[g]

The under-sheriff.

The under-sheriff usually performs all the duties of the office; a very few only excepted, where the personal presence of the high-sheriff is necessary. He must be appointed within one calendar month after the sheriff is himself appointed.[h] But no under-sheriff shall abide in his office above one year;[i] and if he does, by statute 23 Hen. VI. c. 7, he forfeits 200*l.* a very large penalty in those early days. And no under-sheriff or sheriff's officer shall practice as an attorney, during the time he continues in such office:[j] for this would be a great inlet to partiality and oppression. But these salutary regulations are shamefully evaded, by practising in the names of other attorneys, and putting in sham deputies by way of nominal under-sheriffs: by reason of which, says Dalton,[k] the under-sheriffs and bailiffs do grow so cunning in their several places, that they are able to deceive, and it may well be feared that many of them do deceive, both the king, the high-sheriff, and the county; the judicial duties of the under-sheriff are much increased since the act to which we have already alluded,[k] and it is to be considered whether a more competent person than this officer usually is, should not be appointed to discharge them, and it is to be remembered, that the under-sheriff is the general deputy of the sheriff, without showing any special authority.[l]

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[c] Fortesc. *de L. L.* c. 24.

[d] See as to them, p. 309.

[e] Dalt. c. 9.

[f] 3 & 4 Wm. IV. c. 99. See *ante* p. 301, n. y.

[g] Stat. 3 Geo. I. c. 15, s. 10.

[h] 3 & 4. Wm. IV. c. 99, s. 5.

[i] Stat. 42 Edw. III. c. 9.

[j] Stat. 1 Hen. V. c. 4.

[k] Of sheriffs, c. 115.

Bailiffs. Bailiffs, or sheriff's officers, are either bailiffs of hundreds, or special bailiffs. Bailiffs of hundreds are officers appointed over those respective districts by the sheriffs, to collect fines therein; to summon juries; to attend the judges and justices at the assizes, and quarter sessions; and also to execute writs and process in the several hundreds. But, as these are generally plain men, and not thoroughly skilful in this latter part of their office, that of serving writs, and making arrests and executions, it is now usual to join special bailiffs with them; who are generally mean persons, employed by the sheriffs on account only of their adroitness and dexterity in hunting and seizing their prey. The sheriff being answerable for the misdemeanors of these bailiffs, where their acts can be connected with the sheriff,[m] they are therefore usually bound in an obligation with sureties for the due execution of their office, and thence are called bound-bailiffs; which the common people have corrupted into a much more homely appellation.

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Gaolers. Gaolers are also the servants of the sheriff, and he must be responsible for their conduct. Their business is to keep safely all such persons as are committed to them by lawful warrant: and if they suffer any such to escape, the sheriff shall answer it to the king, if it be a criminal matter; or, in a civil case, to the party injured.[n] And to this end the sheriff must[o] have lands sufficient within the county to answer the king and his people. The abuses of gaolers and sheriff's officers, toward the unfortunate persons in their custody, were well restrained and guarded against by statute 32 Geo. II. c. 28, and by statutes 14 Geo. III. c. 59, and

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[k] 3 & 4 Wm. IV. c. 99, s. 5.

[l] See *ante* p.363.

[m] *Drake* v. *Sykes*, 7 T. R. 113. *James* v. *Brawn*, 5 B. & A. 243.

[n] Dalt. c. 118. 4 Rep. 34.

[o] Stat. 9 Edw. II. st. 2. 2 Edw. III. c. 4. 4 Edw. III. c. 9. 5 Edw. III. c. 4. 13 & 14 Car. II. c. 21, §. 7.

24 Geo. III. sess. 2, c. 54, provisions were made for better preserving the health of prisoners, and preventing the gaol distemper. And these statutes, with many others, have been repealed and consolidated by the statute 4 Geo. IV. c. 64, amended by the 5 Geo. IV. c. 85, and the gaol system has been further regulated by the 5 and 6 Wm. IV. cc. 38 and 76. An act of the last session has established a prison for young offenders, 1 and 2 Vict. c. 82.

Expenses of sheriff.

The vast expense, which custom had introduced in serving the office of high-sheriff, was grown such a burthen to the subject, that it was enacted, by statute 13 & 14 Car. II. c. 21, that no sheriff (except of London, Westmorland, and towns which are counties of themselves) should keep any table at the assizes, except for his own family, or give any presents to the judges or their servants, or have more than forty men in livery: yet, for the sake of safety and decency, he may not have less than twenty men in England, and twelve in Wales; upon forfeiture, in any of these cases, of 200*l*. He is also saved some unnecessary expense and trouble by the 3 & 4 Wm. IV. c. 99.

II. The coroner.

II. The coroner's is also a very ancient office at the common law. He is called coroner, *coronator*, because he hath principally to do with pleas of the crown, or such wherein the king is more immediately concerned.[p] And in this light the lord chief justice of the king's bench is the principal coroner in the kingdom, and may (if he pleases) exercise the jurisdiction of a coroner in any part of the realm.[q] But there are also particular coroners for every county of England; usually four, but sometimes six, and sometimes fewer.[r] This office[s] is of equal antiquity with the sheriff; and was ordained together with him to keep the peace, when the earls gave up the wardship of the county. [347]

Elected by the freeholders.

He is still chosen by all the freeholders in the county court; as by the policy of our ancient laws the sheriffs, and conservators of the peace, and all other officers were, who were concerned in matters that affected the liberty of the people;[t] and as verderors of the forest still are, whose business it is to stand between the prerogative and the subject in the execution of the forest laws. For this purpose there is a writ at common law *de coronatore eligendo:*[x] in which it is expressly commanded the sheriff, "*quod talem eligi faciat, qui melius et sciat, et velit, et possit, officio illi intendere.*" And, in order to effect this the more surely, it was enacted by the statute[y] of Westm. 1, that none but lawful and discreet knights should be chosen; and there was an instance in the 5 Edw. III. of a man being removed from this office, because he was only a merchant.[z] But it seems it is now sufficient if a man hath lands enough to be made a knight, whether he be really knighted or not:[a] for the coroner ought to have an estate sufficient to maintain the dignity of his office, and answer any fines that may be set upon him for his misbehaviour;[b] and if he hath not enough to answer, his fine shall be levied on the county, as the punishment for electing an insufficient officer.[c] Now indeed through the culpable neglect of gentlemen of property, this office has been suffered to fall into disrepute, and, in the time of Blackstone, had got into low and indigent hands: so that, although formerly no coroners would condescend to be paid for serving their country, and they were by the aforesaid statute of Westm. 1, expressly forbidden to take a reward, under pain of great forfeiture to the king; yet for many [348] years past they have often desired to be chosen for the sake of their perquisites: being allowed fees for their attendance by the statute 3 Hen. VII. c. I, which sir Edward Coke complains of heavily:[d] though since his time those fees have been much enlarged,[e] and have been recently settled by the 1 Vict. c. 68, and medical men attending an inquest are now very properly entitled to remuneration,[f] which the coroner is authorized to pay.[g] And it deserves consideration whether the emoluments of this office should not be raised to a higher scale, as services adequate to the discharge of the important duties of the office would thus be secured. By the 5 & 6 Wm. IV. c. 76, ss. 62, 63, a different mode of electing coroners for boroughs, having a quarter sessions appointed for them, the council of such borough shall appoint, and by s. 64, where a borough has not a separate court, the county coroner shall henceforward act.

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[p] 2 Inst. 31. 4 Inst. 271.

[q] 4 Rep. 57.

[r] F. N. B. 163.

[s] Mirror. c. 1, §, 3.

[t] 2 Inst. 558.

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[x] F. N. B. 163.

[y] 3 Edw. I. c. 10.

[z] 2 Inst, 32,

[a] F. N. B. 163, 164.

[b] *Ibid.*

[c] Mirr. c. 1. §. 3. 2 Inst. 175.

[d] 3 Inst 210.

[e] Stat. 25 Geo. II. c. 29.

[f] 6 & 7 Wm. IV. c. 89.

[g] 1 Vict. c. 68, s. 2.

Chosen for life.

The coroner is chosen for life, and the time and manner of elections are regulated by the 58 Geo. III. c. 95, but he may be removed either by being made sheriff, or chosen verderor, which are offices incompatible with the other; or by the king's writ *de coronatore exonerando*, for a cause to be therein assigned, as that he is engaged in other business, is incapacitated by years or sickness, hath not a sufficient estate in the county, or lives in an inconvenient part of it.[h] And by the statute 25 Geo. II. c. 29, extortion, neglect, or misbehaviour, are also made causes of removal.

His office is either judicial or ministerial.

The office and power of a coroner are also, like those of the sheriff, either judicial or ministerial; but principally judicial. This is in great measure ascertained by statute 4 Edw. I., *de officio coronatoris;* and consists, first, in inquiring, when any person is slain, or dies suddenly, or in prison, concerning the manner of his death. And this must be "*super visum corporis*;"[i] for if the body be not found, the coroner cannot sit.[j] And it is indispensable that the coroner and jury should have together a view of the body, and that the latter should be then sworn by the former, in presence of the body.[k] He must also sit at the very place where the death happened; and his inquiry is made by a jury of from four, five or six of the neighbouring towns, over whom he is to preside. If any be found guilty by this inquest of murder or other homicide, he is to commit them to prison for farther trial, and is also to inquire concerning their lands, goods and chattels which are forfeited thereby: but, whether it be homicide or not, he must inquire whether any deodand

His judicial duty.

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[h] F. N. B. 163, 164.

[i] 4 Inst. 271.

[j] Thus, in the Gothic constitution, before any fine was payable by the neighbourhood, for the slaughter of a man therein, "*de corpore delicti constare oportebat; i. e. non tam suisse aliquem interritorio isto mortuum inventum, quam vulneratum et cæsum. Potest enim homo etiam ex ulia causa subito mori.*" Stiernhook *de jure Gothor. l.* 3, *c.* 4.

[k] *Rex* v. *Ferrand*, 3 B. & A. 260;

has accrued to the king, or the lord of the franchise, by this death: and must certify the whole of this inquisition (under his own seal and the seals of the jurors)[1] together with the evidence [349] thereon, to the court of king's bench, or the next assises. Another branch of his office is to inquire concerning shipwrecks; and certify whether wreck or not, and who is in possession of the goods. Concerning treasure-trove, he is also to inquire who were the finders, and where it is, and whether any one be suspected of having found and concealed a treasure; "and that may be well perceived (saith "the old statute of Edw. I.) where one liveth riotously, "haunting taverns, and hath done so of long time:" whereupon he might be attached, and held to bail, upon this suspicion only. A coroner's court, it is now held, is not an open court.[m]

His ministerial duty.

The ministerial office of the coroner is only as the sheriff's substitute. For when just exception can be taken to the sheriff, for suspicion of partiality, (as that he is interested in the suit, or of kindred to either plaintiff or defendant) the process must then be awarded to the coroner, instead of the sheriff, for execution of the king's writs.[n] And where the coroner neglects his ministerial duty elisors will be appointed to execute the process and attach the coroner.[o]

III. Justices of the peace.

III. The next species of subordinate magistrates, whom I am to consider, are justices of the peace; the principal of whom is the *custos rotulorum*, or keeper of the records of the county. The common law hath ever had a special care and regard for the conservation of the peace; for peace is the very end and foundation of civil society. And, therefore, before the present constitution of justices was invented, there were peculiar officers appointed by the common law for the maintenance of the public peace. Of these some had, and still have, this power annexed to other offices which they hold; others had it merely by itself, and were thence named *custodes* or *conservatores pacis*. Those that were so *virtute officii* still continue: but the latter sort are superseded by the modern justices.

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[1] Stat. 33 Hen. VIII. c. 12. 1 & 2 P. & M. c. 13. 2 West. Symbol. §. 310. Crompt. 264. Tremain. P. C. 621.

[m] *Garnet* v. *Ferrard*, 6 B. & C. 626. 9 D. & R. 657.

[n] 4 Inst. 271.

[o] *Andrews* v. *Sharp*, 2 Sir Wm. Bla. 911. *Ibid*. 1218.

The chief conservators of the peace.

The king's majesty[p] is, by his office and dignity royal, the principal conservator of the peace within all his dominions; and may give authority to any other to see the peace kept, and to punish such as break it: hence it is usually [350] called the king's peace. The lord chancellor or keeper, the lord treasurer, the lord high steward of England, the lord mareschal, the lord high constable of England, (when any such officers are in being) and all the justices of the court of king's bench, (by virtue of their offices,) and the master of the rolls (by prescription) are general conservators of the peace throughout the whole kingdom, and may commit all breakers of it, or bind them in recognizances to keep it:[q] the other judges are only so in their own courts. The coroner is also a conservator of the peace within his own county;[r] as is also the sheriff;[s] and both of them may take a recognizance or security for the peace. Constables, tything-men, and the like, are also conservators of the peace within their own jurisdictions; and may apprehend all breakers of the peace and commit them, till they find sureties for their keeping it.[t]

The history of this office.

Those that were, without any office, simply and merely conservators of the peace, either claimed that power by prescription;[u] or were bound to exercise it by the tenure of their lands;[v] or, lastly, were chosen by the freeholders in full county court before the sheriff; the writ for their election directing them to be chosen "*de probioribus et potentioribus comitatus sui in custodes pacis,*"[w] But when queen Isabel, the wife of Edward II. had contrived to depose her husband by a forced resignation of the crown, and had set up his son Edward III. in his place; this, being a thing then without example in England, it was feared would much alarm the people: especially as the old king was living, though hurried about from castle to castle; till at least he met with an untimely death. To prevent therefore any risings, or other disturbance of the peace, the new king sent writs to all the sheriffs in England, the form of which is preserved by Thomas Walsingham,[x] giving a plausible account of the manner of his obtaining the crown; [351] to wit, that it was done *ipsius patris beneplacito:* and withal commanding each sheriff that the peace be kept throughout his bailiwick, on pain and peril of disinheritance and loss of life and limb. And in a few weeks after the date of these writs, it was ordained in parliament,[y] that, for the better maintaining and keeping of the peace in every county, good men and lawful, which were no maintainers of evil, or barretors in the country, should be *assigned* to keep the peace. And in this manner, and upon this occasion, was the election of the conservators of the peace taken from the people, and given to the king;[z] this assignment being construed to be by the king's commission.[a] But still they were only called conservators, wardens, or keepers of the peace, till the statute 34 Edward III. c. 1, gave them the power of trying felonies; and then they acquired the more honourable appellation of justices.[b]

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[p] Lambard. *Eirenarch.* 12.

[q] Lamb. 12.

[r] Britton, 3.

[s] F. N. B. 81.

[t] Lamb. 14.

[u] *Ibid.* 15.

[v] *Ibid.* 17.

[w] *Ibid.* 16.

How justices are appointed.

These justices are appointed by the king's special commission under the great seal, the form of which was settled by all the judges, *A. D.* 1590.[c] This appoints them all,[d] jointly and severally, to keep the peace, and any two or more of them to inquire of and determine felonies and other misdemeanors: in which number some particular justices, or one of them, are directed to be always included, and no business to be done without their presence; the words of the commission running thus, "*quorum aliquem vestrum,* "*A. B. C. D. &c. unum esse volumus:*" whence the persons so named are usually called justices of the *quorum.* And formerly it was customary to appoint only a select number of justices, eminent for their skill and discretion, to be of the *quorum;* but now the practice is to advance almost all of them to that dignity, naming them all over again in the *quorum* clause, except perhaps only some one inconsiderable person for the sake of propriety: and no exception is now allowable, for not expressing in the form of warrants, &c. that the justice who issued them is of the [352] *quorum*.[e] When any justice intends to act under this commission, he sues out a writ of *dedimus potestatem*, from the clerk of the crown in chancery, empowering certain persons therein named to administer the usual oaths to him; which done, he is at liberty to act.

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[x] Hist. *A. D.* 1327.

[y] Stat. 1 Edw. III. c. 16.

[z] Lamb. 20.

[a] Stat. 4 Edw. III. c. 2. 18 Edw. III. st. 2, c. 2.

[b] Lamb. 23.

[c] *Ibid.* 43.

[d] See the form itself, Lamb. 35. Burn. tit. *Justices,* §. 1.

The number and qualifications of justices.

Touching the number and qualifications of these justices; it was ordained by statute 18 Edw. III. c. 2, that *two* or *three*, of the best reputation in each county, shall be assigned to be keepers of the peace. But these being found rather too few for that purpose, it was provided by statute 34 Edw. III. c. 1, that one lord, and three, or four, of the most worthy men in the county, with some learned in the law, shall be made justices in every county. But afterwards the number of justices, through the ambition of private persons, became so large, that it was thought necessary by statute 12 Ric. II. c. 10, and 14 Ric. II. c. 11, to restrain them at first to six, and afterwards to eight only. But this rule is now disregarded, and the cause seems to be (as Lambard observed long ago)[f] that the growing number of statute laws, committed from time to time to the charge of justices of the peace, have occasioned also (and very reasonably) their increase to a larger number. And, as to their qualifications, the statutes just cited direct them to be of the best reputation, and most worthy men of the county: and the stat. 13 Ric. II. c. 7, orders them to be of the most efficient knights, esquires, and gentlemen of the law. Also by statute 2 Hen. V. st. 1, c. 4, and st. 2, c. 1, they must be resident in their several counties. And because, contrary to these statutes, men of small substance had crept into the commission, whose poverty made them both covetous and contemptible, it was enacted by statute 18 Hen. VI. c. 11, that no justice should be put in commission, if he had not lands to the value of *20l. per annum*. And, the rate of money being greatly altered since that time, it is now enacted by statutes 5 Geo. II. c. 18, and 18 Geo. II. c. 20, that every justice, except as is therein excepted, shall have an estate of 100*l.* *per annum* clear of all deductions; but this estate may be freehold, copyhold, or even leasehold, for a term not less than twenty-one years; and, if he acts without such qualification, he shall forfeit 100*l.* This qualification[g] is almost [353] equivalent to the 20*l.* *per annum* required in Henry the sixth's time: and of this[h] the justice must now make oath. Also it is provided by the act 5 Geo. II. that no practising attorney, solicitor, or proctor, shall be capable of acting as a justice of the peace for any county. By the 1 Wm. IV. c. 43, some of the fees and stamp duties, chargeable on the renewal of appointments and commissions are abolished.

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[e] Stat. 26 Geo. II. c. 27. See also stat. 7 Geo. III. c. 21.

[f] Lamb. 34.

How this office is determinable. As the office of these justices is conferred by the king, so it subsists only during his pleasure; and is determinable, 1. By the demise of the crown; that is, in six months after.[i] But if the same justice is put in commission by the successor, he shall not be obliged to sue out a new *dedimus*, or to swear to his qualification afresh:[j] nor, by reason of any new commission, to take the oaths more than once in the same reign.[k] 2. By express writ under the great seal,[l] discharging any particular person from being any longer justice. 3. By superseding the commission by writ of *supersedeas*, which suspends the power of all the justices, but does not totally destroy it: seeing it may be revived again by another writ, called a *procedendo*. 4. By a new commission, which virtually, though silently, discharges all the former justices that are not included therein; for two commissions cannot subsist at once. 5. By accession of the office of sheriff or coroner.[m] Formerly it was thought, that if a man was named in any commission of the peace, and had afterwards a new dignity conferred upon him, that this determined his office; he no longer answering the description of the commission: but now[n] it is provided, that, notwithstanding a new title of dignity, the justice on whom it is conferred shall still continue a justice.

Their power and duty. The power, office, and duty of a justice of the peace depend on his commission, and on the several statutes which have created objects of his jurisdiction. His commission, first, empowers him singly to conserve the peace; and thereby gives him all the power of the ancient conservators at [354] the common law, in suppressing riots and affrays, in taking securities for the peace, and in apprehending and committing felons and other inferior criminals. It also empowers any two or more to hear and determine all felonies and other offences; which is the ground of their jurisdiction at sessions, of which more will be said in its proper place. And as to the powers given to one, two or more justices by the several statutes, which from time to time have heaped upon them such an infinite variety of business, that few care to undertake, and fewer understand, the office; they are such and of so great importance to the public, that the country is greatly obliged to any worthy magistrate, that without sinister views of his own will engage in this troublesome service. And therefore, if a well-meaning justice makes any undesigned slip in his practice, great lenity and indulgence are shewn to him in the courts of law; and there are many statutes made to protect him in the upright discharge of his office;[o] which, among other privileges, prohibit such justices from being sued for any oversights without notice beforehand: and stop all suits begun, on tender made of sufficient amends. But, on the other hand, any malicious or tyrannical abuse of their office is usually severely punished; and all persons who recover a verdict against a justice, for any wilful or malicious injury, are entitled to double costs.

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[g] See bishop Fleetwood's calculations in his *Chronicon Pretiosum*.

[h] Stat. 18 Geo. II. c. 20.

[i] Stat. 1 Ann. c. 8.

[j] Stat. 1 Geo. III. c. 13.

[k] Stat. 7 Geo. III. c. 9.

[l] Lamb. 67.

[m] Stat. 1 Mar. st. 2, c. 8.

[n] Stat. 1 Edw. VI. c. 7.

Works relating to justices of the peace

It is impossible upon our present plan to enter minutely into the particulars of the accumulated authority, thus committed to the charge of these magistrates. I must therefore recommend to the student the perusal of Mr. Lambard's *Eirenarcha*, and Dr. Burn's *Justice of the Peace;* wherein he will find every thing relative to this subject, both in ancient and modern practice, collected with great care and accuracy, and disposed in a most clear and judicious method.

I shall next consider some officers of lower rank than [355] those which have gone before, and of more confined jurisdiction; but still such as are universally in use through every part of the kingdom.

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[o] Stat. 7 Jac. I. c. 5. 21 Jac. I. III. c. 141.
c. 12. 24 Geo. II. c. 44. 43 Geo.

IV. The constable.

IV. Fourthly, then, of the constable. The word *constable* is frequently said to be derived from the Saxon, koning-ꞅtapel, and to signify the support of the king. But, as we borrowed the name as well as the office of constable from the French, I am rather inclined to deduce it, with Sir Henry Spelman and Dr. Cowel, from that language: wherein it is plainly derived from the Latin *comes stabuli*, an officer well known in the empire; so called because, like the great constable of France, as well as the lord high constable of England, he was to regulate all matters of chivalry, tilts, tournaments, and feats of arms, which were performed on horseback. This great office of lord high constable hath been disused in England, except only upon great and solemn occasions, as the king's coronation and the like, ever since the attainder of Stafford duke of Buckingham under king Henry VIII.; as in France it was suppressed about a century after by an edict of Louis XIII:[p] but from his office, says Lambard,[q] this lower constableship was at first drawn and fetched, and is as it were a very finger of that hand. For the statute of Winchester,[r] which first[s] appoints them, directs that, for the better keeping of the peace, two constables in every hundred and franchise shall inspect all matters relating to *arms* and *armour*.

Of two sorts, higher and petty constables.

Constables are of two sorts, high constables, and petty constables. The former were first ordained by the statute of Winchester, as before-mentioned; are appointed at the court leets of the franchise or hundred over which they preside, or, in default of that, by the justices at their quarter sessions; and are removable by the same authority that appoints them.[t] The petty constables are inferior officers in [356] every town and parish, subordinate to the high constable of the hundred, first instituted about the reign of Edw. III.[u] These petty constables have two offices united in them; the one ancient, the other modern. Their ancient office is that of headborough, tithing-man, or borsholder; of whom we formerly spoke,[v] and who are as ancient as the time of king Alfred: their more modern office is that of constable merely; which was appointed (as was observed) so lately as the reign of Edward III., in order to assist the high constable.[w] And in general the ancient headboroughs, tithing-men, and borsholders, were made use of to serve as petty constables; though not so generally, but that in many places they still continue distinct officers from the constable. They are all chosen by the jury at the court leet; or if no court leet be held, are appointed by two justices of the peace.[x]

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[p] Philip's life of Pole, ii. III.

[q] Of constables, 5.

[r] 13 Edw. I. c. 6.

[s] As to this, see Salk. 175.

[t] Salk. 150.

[u] Spelm. Gloss. 148.

Duty of constable.

The general duty of all constables, both high and petty, as well as of the other officers, is to keep the king's peace in their several districts: and to that purpose they are armed with very large powers, of arresting, and imprisoning, of breaking open houses, and the like; of the extent of which powers, considering what manner of men are for the most part put into these offices, it is perhaps very well that they are generally kept in ignorance. By stat. 24 Geo. II. c. 44, no action shall be brought against a constable for any thing done in obedience to a magistrate's warrant, until demand has been made of a perusal and copy of the warrant, and that demand having been neglected to be complied with for the space of six days. One of their principal duties, arising from the statute of Winchester, which appoints them, is to keep watch and ward in their respective jurisdictions. Ward, guard, or *custodia*, is chiefly applied to the day time, in order to apprehend rioters, and robbers on the highways; the manner of doing which is left to the discretion of the justices of the peace and the constable:[y] the hundred being however answerable for all robberies committed therein, by day light, for having kept negligent guard. Watch is properly applicable to the night only, (being called among our Teutonic ancestors *wacht* or *wacta*[z]) and it begins at the time when ward ends, and ends when that begins: for, by the statute of Winchester, in walled towns the gates [357] shall be closed from sun-setting to sun-rising, and watch shall be kept in every borough and town, especially in the summer season, to apprehend all rogues, vagabonds, and night-walkers, and make them give an account of themselves. **Watchmen.** The constable may appoint watchmen, at his discretion, regulated by the custom of the place; and these, being his deputies, have for the time being the authority of their principal. But, with regard to the infinite number of other minute duties, that are laid upon constables by a diversity of statutes, I must again refer to Mr. Lambard and Dr. Burn; in whose compilations may be also seen, what powers and duties belong to the constable or tithing-man indifferently, and what to the constable only; for the constable may do whatever the tithing-man may; but it does not hold *e converso*, the tithing-man not having an equal power with the constable. **Special constables.** There are also special constables, who must be appointed by any two justices of the peace upon the information on oath of five respectable householders that any tumult, riot, or felony, has taken place, or is likely to take place: and in all emergencies magistrates may, without any application, appoint and swear in any number of voluntary special constables for the preservation of the peace.[a] **The new police.** But a more efficient peace establishment than any before known has been lately established and organized in the metropolis, and other large towns, the new police, under the authority of the 10 Geo. IV. c. 44, and other acts for regulating the police force in these places.[b]

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[v] Page 111.

[w] Lamb. 9.

[x] Stat. 13 & 14 Car. II. c. 12.

[y] Dalt. just. c. 104.

[z] *Excubias et explorationes quas wactas vocant. Capitular. Hludov. Pii. c.* 1, *A. D.* 815.

V. Surveyors of highways. V. We are next to consider the surveyors of the highways. Every parish is bound of common right to keep the high roads, that go through it, in good and sufficient repair; unless by reason of the tenure of lands, or otherwise, this care is consigned to some particular private person. From this burthen no man was exempt by our ancient laws, whatever other immunities he might enjoy: this being part of the *trinoda necessitas*, to which every man's estate was subject; viz. *expeditio contra hostem, arcium constructio, et pontium reparatio*. For, though the reparation of bridges only is expressed, yet that of roads also must be understood; as in the Roman law, *ad instructiones reparationesque itinerum et*

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[a] 1 & 2 Wm. IV. c. 41, amended by 5 & 6 Wm. IV. c. 43, and 3 & 4 Wm. IV. c. 90.

[b] See 3 Wm. IV. c. 19.

pontium, nullum genus hominum, nulliusque dignitatis ac venerationis meritis, cessare oportet.[c] And indeed, now, for the most part, the care of the roads only seem to belong to parishes; that of bridges being in great measure devolved upon the county at large, by statute 22 Hen. VIII. c. 5. If the parish neglected these repairs, they might formerly, as they may still, be indicted for such their neglect: but it was not then incumbent on any particular officer to call the parish together, and set them upon this work; for which reason by the statute 2 & 3 Ph. & M. c. 8, surveyors [358] of the highways were ordered to be chosen in every parish.[d]

How appointed. These surveyors were originally, according to the statute of Philip and Mary, to be appointed by the constable and churchwardens of the parish; but now they are appointed under the provisions of the 5 & 6 Wm. IV. c. 50, by the inhabitants of every parish[e] and may have salaries allotted them for their trouble.

Their office and duty. Their office and duty consists in putting in execution a variety of laws for the repairs of the public highways; that is, of ways leading from one town to another: all which were reduced into one act by statute 13 Geo. III. c. 78, which enacts, 1. That they might remove all annoyances in the highways, or give notice to the owner to remove them: who was liable to penalties on non-compliance. 2. They were to call together all the inhabitants and occupiers of lands, tenements, and hereditaments within the parish, six days in every year, to labour in fetching materials or repairing the highways: all persons keeping draughts (of three horses, &c.) or occupying lands, being obliged to send a team for every draught, and for every 50*l.* a-year, which they keep or occupy; persons keeping less than a draught, or occupying less than 50*l.* a-year, to contribute in a less proportion; and all other persons chargeable, between the ages of eighteen and sixty-five, to work or find a labourer. But they might compound with the surveyors, at certain easy rates established by the act. And every cartway leading to any market town must have been made twenty feet wide at the least, if the fences would permit; and might be increased by two justices, at the expense of the parish, to the breadth of thirty feet. 3. The surveyors might lay out their own money in purchasing materials for repairs, in [359] erecting guide-posts, and making drains, and should be reimbursed by a rate, to be allowed at a special sessions. 4. In case the personal labour of the parish was not sufficient, the surveyors, with the consent of the quarter sessions, might levy a rate on the parish, in aid of the personal duty, not exceeding, in any one year, together with the other highway rates, the sum of 9*d.* in the pound; for the due application of which they were to account upon oath. And these provisions are now incorporated, with some alterations, into the General Highway Act, 5 & 6 Wm. IV. c. 50, by which all prior acts were repealed, and for a full account of which, I must again refer to Burn's *Justice of the Peace*, as its provisions are far too extensive to be here enumerated.

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[c] C. II. 74, 4.

[d] This office, Mr. Dalton (Just. cap. 50.) says, exactly answers that of the *curatores viarum* of the Romans; but it should seem that theirs was an office of rather more dignity and authority than ours: not only from comparing the method of making and mending the Roman ways with those of our country parishes; but also because one Thermus, who was the curator of the Flaminian way, was candidate for the consulship with Julius Cæsar. (*Cic. ad Attic. l.* 1, *ep.* 1.)

[e] See a full account of the law statutes relating to highways in *Burn's Justice*, under that title.

Turnpikes.

As for turnpikes, which are now pretty generally introduced in aid of highway rates, and the law relating to them, these depend principally on the particular powers granted in the several road acts, and upon some general provisions which are extended to all turnpike roads in the kingdom, first by statute 13 Geo. III. c. 84, which was amended by many subsequent acts,[f] all of which, including the stat. 13 Geo. III. c. 84, were consolidated by the 3 Geo. IV. c. 126, which act has been amended and explained by several subsequent acts.

VI. Overseers of the poor.

VI. I proceed therefore, lastly, to consider the overseers of the poor; their original, appointment, and duty.

The poor of England, till the time of Henry VIII., subsisted entirely upon private benevolence, and the charity of well disposed christians. For, though it appears by the mirror,[g] that by the common law the poor were to be "sustained by parsons, rectors of the church, and the parishioners; so that none of them die for default of sustenance;"

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[f] Stat. 14 Geo. III. c. 14, 36, 57, 82. 16 Geo. III. c. 39. 18 Geo. III. c. 28.

[g] c. 1, §. 3.

and though by the statutes 12 Ric. II. c. 7, and 19 Hen. VII. c. 12, the poor are directed to abide in the cities or towns wherein they were born, or such wherein they had dwelt for three years, (which seem to be the first rudiments of parish settlements) yet till the statute 27 Hen. VIII. c. 25, I find no compulsory method[h] chalked out for this purpose: but the poor seem to have been left to such relief as the humanity of their neighbours would afford them. The monasteries were, in particular, their principal resource; and, among other bad effects which attended the monastic institutions, it was not perhaps one of the least (though frequently esteemed quite otherwise) that they supported and fed a very numerous and very idle poor, whose sustenance depended upon what was daily distributed in alms at the gates of the religious houses. But, upon the total dissolution of these, the inconvenience of thus encouraging the poor in habits of indolence and beggary was quickly felt throughout the kingdom: and abundance of statutes were made in the reign of king Henry the eighth and his children, for providing for the poor and impotent; which, the preambles to some of them recite, had of late years greatly increased. These poor were principally of two sorts: sick and impotent, and therefore unable to work; idle and sturdy, and therefore able, but not willing, to exercise any honest employment. To provide in some measure for both of these, in and about the metropolis, Edward the sixth founded three royal hospitals; Christ's and St. Thomas's, for the relief of the impotent through infancy or sickness; and Bridewell for the punishment and employment of the vigorous and idle. But these were far from being sufficient for the care of the poor throughout the kingdom at large: and therefore, after many other fruitless experiments, by statute 43 Eliz. c. 2, overseers of the poor were appointed in every parish.

History of the poor laws.

[360]

By 43 Eliz. c. 2, overseers of the poor appointed.

By virtue of the statute last mentioned, these overseers were to be nominated yearly in Easter-week, or within one month after, (though a subsequent nomination was valid)[i] by two justices dwelling near the parish. They must have

How nominated.

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[h] By 5 & 6 Edw. VI. c. 2, the minister and churchwarden were annually to appoint two able persons to be gatherers of alms for the poor.

[i] Stra. 1123.

been substantial householders, and so expressed to be in the appointment of the justices.[j]

Their office and duty.

Their office and duty, according to the same statute, were principally these: first, to raise competent sums for the necessary relief of the poor, impotent, old, blind, and such other, being poor and not able to work: and secondly, to provide work for such as are able, and cannot otherwise get employment: but this latter part of their duty, which, according to the wise regulations of that salutary statute, should go hand in hand with the other, had been long most shamefully neglected. However, for these joint purposes, they were empowered to make and levy rates upon the several inhabitants of the parish, by the same act of parliament; [361] which was farther explained and enforced by several subsequent statutes.

The objects of the statute of Elizabeth.

The two great objects of this statute seem to have been, 1. To relieve the impotent poor, and them only. 2. To find employment for such as were able to work: and this principally by providing stocks of raw materials to be worked up at their separate homes, instead of accumulating all the poor in one common workhouse; a practice which put the sober and diligent upon a level (in point of their earnings,) with those who were dissolute and idle, depressed the laudable emulation of domestic industry and neatness, and destroyed all endearing family connexions, the only felicity of the indigent. Whereas, if none had been relieved but those who were incapable to get their livings, and that in proportion to their incapacity; if no children had been removed from their parents, but such as were brought up in rags and idleness; and if every poor man and his family had been regularly furnished with employment, and allowed the whole profits of their labour;—a spirit of busy cheerfulness would soon have diffused itself through every cottage; work would have become easy and habitual, when absolutely necessary for daily subsistence; and the peasant would have gone through his task without a murmur, if assured that he and his children (when incapable of work through infancy, age, or infirmity) would then, and then only, be entitled to support from his opulent neighbours.

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[j] 2 Lord Raym. 1394.

This appears to have been the plan of the statute of queen Elizabeth; in which the only defect was confining the management of the poor to small, parochial districts; which were frequently incapable of furnishing proper work, or providing an able director. However, the laborious poor were then at liberty to seek employment wherever it was to be had: none being obliged to reside in the places of their settlement, but such as were unable or unwilling to work; and those places of settlement being only such where they were *born*, or had made their *abode*, originally for three years,[k] and afterwards (in the case of vagabonds) for one year only.[l]

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After the Restoration the law of *settlement* introduced.

After the Restoration a very different plan was adopted, which rendered the employment of the poor more difficult, by authorizing the subdivision of parishes; had greatly increased their number, by confining them all to their respective districts; had given birth to the intricacy of our poor-laws, by multiplying and rendering more easy the methods of gaining settlements; and, in consequence, had created an infinity of expensive law-suits between contending neighbourhoods, concerning those settlements and removals. By the statute 13 & 14 Car. II. c. 12, a legal settlement was declared to be gained by *birth;* or by *inhabitancy*, *apprenticeship*, or *service*, for forty days: within which period all intruders were made removable from any parish by two justices of the peace, unless they settled in a tenement of the annual value of 10*l.* The frauds, naturally consequent upon this provision, which gave a settlement by so short a residence, produced the statute 1 Jac. II. c. 17, which directed *notice* in writing to be delivered to the parish officers, before a settlement could be gained by such residence. Subsequent provisions allowed other circumstances of notoriety to be equivalent to such notice given; and those circumstances were from time to time altered, enlarged, or restrained, whenever the experience of new inconveniencies, arising daily from new regulations, suggested the necessity of a remedy. And the doctrine of *certificates* was invented, by way of counterpoise, to restain a man and his family from acquiring a new settlement by any length of residence whatever, un-

Certificates.

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[k] Stat. 19 Hen. VII. c. 12. 1 Edw VI. c. 3. 3 Edw. VI. c. 16. 14 Eliz. c. 5.

[l] Stat. 39 Eliz. c. 4.

less in two particular excepted cases: which made parishes very cautious of giving such certificates, and of course confined the poor at home; where frequently no adequate employment could be had.

Some account of the law of settlement.

The law of settlements was reducible to the following general heads; or, a settlement in a parish might have been acquired, 1. By *birth*, for, wherever a child was first known to be, that was always *primâ facie* the place of settlement, until some other could be shown.[m] This was also generally [363] the place of settlement of a bastard child;[n] for a bastard having in the eye of the law no father, could not be referred to *his* settlement, as other children may.[o] But, in legitimate children, though the place of birth was *primâ facie* the settlement, yet it was not conclusively so; for there were, 2. Settlements by *parentage*, being the settlement of one's father or mother: all legitimate children being really settled in the parish where their parents were settled, until they got a new settlement for themselves.[p] A new settlement might be acquired several ways; as, 3. By *marriage*. For a woman, marrying a man that was settled in another parish, changed her own settlement; the law not permitting the separation of husband and wife.[q] But if the man had no settlement, her's was suspended during his life, if he remained in England and was able to maintain her; but in his absence, or after his death, or during (perhaps) his inability, she might be removed to her old settlement.[r] The other methods of acquiring settlements in any parish were all reducible to this one, of *forty days' residence* therein: but this forty days' residence (which was construed to be lodging or lying there) must not have been by fraud, or stealth, or in any clandestine manner; but made notorious, by one or other of the following concomitant circumstances. The next method therefore of gaining a settlement was, 4. By forty days' residence, and *notice*. For if a stranger came into a parish, and delivered notice in writing of his place of abode, and number of his family, to one of the overseers

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[m] Carth. 433. Comb. 364. Salk. 485. 1 Lord Raym. 567.

[n] See *post*, chap. 16, *ad fin*.

[o] Salk. 427.

[p] Salk. 528. 2 Lord Raym. 1473.

[q] Stra. 544.

[r] Foley, 249, 251, 252, Bur. Sett. C. 370.

(which must be read in the church and registered) and resided there unmolested for forty days after such notice, he was legally settled thereby.[s] For the law presumed that such a one at the time of notice was not likely to become chargeable, else he would not have ventured to give it; or that in such case, the parish would have taken care to remove him. But there were also other circumstances equivalent to such notice; therefore, 5. *Renting* for a year a tenement of the yearly value of ten pounds, and residing forty days in the parish, gained a settlement without notice;[t] upon the principle of having substance enough to gain credit for such a house. 6. Being charged to and paying the public [364] *taxes* and levies of the parish; (excepting those for scavengers, highways,[u] and the duties on houses and windows[v]) and, 7. Executing, when legally appointed, any public parochial *office* for a whole year in the parish, as churchwarden, &c., were both of them equivalent to notice, and gained a settlement,[w] if coupled with a residence of forty days. 8. Being *hired* for a year, when unmarried and childless, and *serving* a year in the same service; and 9. Being bound an *apprentice* gave the servant, and apprentice a settlement without notice,[x] in that place wherein they served the last forty days. This was meant to encourage application to trades, and going out to reputable services. 10. Lastly, the having an *estate* of one's own, and residing thereon forty days, however small the value may be, in case it be acquired by act of law or of a third person, as by descent, gift, devise, &c., was a sufficient settlement:[y] but if a man acquired it by his own act, as by purchase, (in it's popular sense, in consideration of money paid) then unless the consideration advanced, *bonâ fide*, were 30*l.* it was no settlement for any longer time, than the person should inhabit thereon.[z] He was in no case removable from his own property; but he could not, by any trifling or fraudulent purchase of his own, acquire a permanent and lasting settlement.

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[s] Stat. 13 & 14 Car. II. c. 12. 1 Jac. II. c. 17. 3 & 4 Wm. and Mar. c. 11.

[t] Stat. 13 & 14 Car. II. c. 12.

[u] Stat. 9 Geo. I. c. 7, §. 6.

[v] Stat. 21 Geo. II. c. 10. 18 Geo. III. c. 26.

[w] Stat. 3 & 4 W. and M. c. 11.

[x] Stat. 3 & 4 W. and M. c. 11. 8 & 9 Wm. III. c. 30. 31 Geo. II. c. 11.

[y] Salk. 524.

[z] Stat. 9 Geo. I. c. 7.

All persons not so settled were removable.

All persons, not so settled, might have been removed to their own parishes, on complaint of the overseers, by two justices of the peace, if they should adjudge them likely to become chargeable to the parish, into which they have intruded: unless they were in a way of getting a legal settlement, as by having hired a house of 10*l.* *per annum*, or living in an annual service; for then they were not removable.[a] And in all other cases, if the parish to which they belonged, would grant them a certificate, acknowledging them to be *their* parishioners, they could not be removed merely because *likely* to become chargeable, but only when they became *actually* chargeable.[b] But such certificated person could gain no settlement by any of the means above-mentioned; unless by renting a tenement of 10*l.* *per annum*, or by serving an annual office in the parish, being legally placed therein: neither could an apprentice or servant to such certificated person gain a settlement by such their service.[c] [365]

Reflections on the state of the poor law.

These were the general heads of the laws relating to the poor, which, by the resolutions of the courts of justice thereon within a century and a half past, branched into a great variety. And yet, notwithstanding the pains that were taken about them, they still remained very imperfect, and inadequate to the purposes they were designed for: a fate, that has generally attended most of our statute laws, where they have not the foundation of the common law to build on. When the shires, the hundreds, and the tithings, were kept in the same admirable order in which they were disposed by the great Alfred, there were no persons idle, consequently none but the impotent that needed relief: and the statute of 43 Eliz. seems entirely founded on the same principle. But when this excellent scheme was neglected and departed from, we could not but observe with concern, what miserable shifts and lame expedients were from time to time adopted, in order to patch up the flaws occasioned by this neglect. There is not a more necessary or more certain maxim in the frame and constitution of society, than that every individual must contribute his share, in order to the well-being of the community: and surely they must be very deficient in sound policy, who suffer one-half of a parish to continue idle, dissolute, and unemployed; and at length are amazed to find, that the industry of the other half is not able to maintain the whole.

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[a] Salk. 472.

[b] Stat. 8 & 9 Wm. III. c. 30.

[c] Stat. 12 Ann. c. 18.

The old poor law was superseded.

This account of the old law relating to the poor, and its ill administration, and the reflections on its inconvenience and uncertainty, were those which suggested themselves to Blackstone, and form indeed the best reasons for the endeavour to effect some alteration. This was indeed long demanded and often attempted before it was completed, and although I am far from saying that the recent statute[c] which is now the law on this subject is unobjectionable in all its parts, yet it cannot be disputed that it has, to a great extent, redressed the complaints against the former system of poor law originally made by the impartial authority of our great commentator. With this preliminary observation I shall now give a very brief account of the new poor law.

The new poor law act, 4 & 5 Wm. IV c. 76.

In the first place it establishes an entirely new machinery for dispensing relief to the poor. This is done by means of a commission consisting of three commissioners, a limited number of assistant commissioners, and a competent number of other officers, (ss. 1—9). The administration of relief from the passing of the act is to be subject to the control of the commissioners, (s. 15), who are to issue rules for the management of the poor, the government of workhouses, and other matters connected with this subject, which rules are to be sent to a secretary of state, and laid before parliament, (ss. 16 & 17). Workhouses are to be wholly under the control of the commissioners, (ss. 21—25,) and in order more completely to carry into effect the improvements contemplated by the act, the commissioners may declare so many parishes as they may see fit to be united for the administration of the laws for the relief of the poor, (s. 26). In these unions any two justices of the peace may direct relief to be given to any adult person who shall from age, or infirmity of body, be wholly unable to work, without requiring such person to reside in any workhouse, (s. 27), but one great principle of this act is to prevent all out-door relief, except in such cases. Where parishes are thus united, a board of guardians shall be chosen, and the workhouses of the union shall be governed, and the relief of the poor administered by such board. The guardians are to be elected by the rate-payers, (s. 38). The inefficiency of the overseers of the poor, who administered the relief under the old system, has been already pointed out; to remedy this evil, the commissioners may direct the overseers or guardians of any parish or union to appoint certain paid officers for superintending or assisting in the administration of the relief or employment of the poor, (s. 46). The main object of the law however is, to stop all relief to the able-bodied, except medical attendance, otherwise than in well-regulated workhouses; and it is accordingly enacted that the commissioners, by such rules as they may see proper, may declare to what extent the relief shall be given to the able-bodied, or their families, and in what manner such out-door relief may be afforded; and several special provisions are made in the act as to particular cases, when relief may be afforded, (ss. 54—59). Perhaps, however, the most indisputable benefit arising from the act, is the sweeping away the greater part of the cumbrous and confused law of settlement, out of which we have seen so many nice distinctions arose, and which was a source of so much difficulty and distress to the pauper, and expense and vexation to the parish and the rate-payers. The only modes of acquiring a settlement by the new law are, 1. Birth. 2. Parentage. 3. Apprenticeship. 4. Marriage. 5. Occupying a tenement and paying one year's rate. 6. Possessing an estate, and residence within ten miles thereof, (ss. 64—68). All the others mentioned by Blackstone are abolished. Every bastard born after the passing of the act, shall follow the settlement of its mother until such child shall attain the age of sixteen, or shall acquire a settlement in its own right, (s. 71).[a]

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[c] 4 & 5 Wm. IV. c. 76.

This short notice of the new poor law I have thought it proper to give, but it is to be remembered that it cannot at present be considered the permanent settlement of this important subject; a parliamentary inquiry is still pending, and some modification may be expected even of the portions, of the act to which I have referred; but certainly of others to which I have not thought it necessary to allude.

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[a] See *post*, chap. 16, *ad fin.*

By an act of last session,[d] relief is extended to the poor in Ireland by the establishment of workhouses for that purpose.

Duties of overseers under the reform act.

It should be observed, that although overseers are relieved by the new poor law act of much of their former labour, yet new duties are given them, as we have already seen, by the reform act.[f]

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[e] 1 & 2 Vict. c. 56.

[f] See *ante*, pp. 176—179.

CHAPTER THE TENTH.

OF THE PEOPLE WHETHER ALIENS, DENIZENS OR NATIVES.

[366] HAVING, in the eight preceding chapters, treated of persons as they stand in the public relations of *magistrates*, I now proceed to consider such persons as fall under the denomination of the *people*. And herein all the inferior and subordinate magistrates, treated of in the last chapter, are included.

The people are divided into aliens and natural born subjects.

The first and most obvious division of the people is into aliens and natural-born subjects. Natural-born subjects are such as are born within the dominions of the crown of England; that is, within the ligeance, or as it is generally called, the allegiance of the king: and aliens, such as are born out of it. Allegiance is the tie, or *ligamen*, which binds the subject to the king, in return for that protection which the king affords the subject. The thing itself, or substantial part of it, is founded in reason and the nature of government; the name and the form are derived to us from our Gothic ancestors. Under the feudal system, every owner of lands held them in subjection to some superior or lord, from whom or whose ancestors the tenant or vassal had received them: and there was a mutual trust or confidence subsisting between the lord and vassal, that the lord should protect the vassal in the enjoyment of the territory he had granted him, and, on the other hand, that the vassal should be faithful to the lord and defend him against all his enemies. This obligation on the part of the vassal was called his *fidelitas* or fealty; and an oath of fealty was required, by the feudal law, to be taken by all tenants to their landlord, which is couched in almost the same terms as our ancient oath of allegiance:[a] [367] except that in the usual oath of fealty there was frequently a saving or exception of the faith due to a superior lord by name, under whom the landlord himself was perhaps only a tenant or vassal. But when the acknowledgment was made to the absolute superior himself, who was vassal to no man, it was no longer called the oath of fealty, but the oath of allegiance; and therein the tenant swore to bear faith to his sovereign lord, in opposition to all men, without any saving or exception: "*contra omnes homines fidelitatem fecit.*"[b] Land held by this exalted species of fealty was called *feudum ligium*, a liege fee; the vassals *homines ligii*, or liege men; and the sovereign their *dominus ligius*, or liege lord. And when sovereign princes did homage to each other, for lands held under their respective sovereignties, a distinction was always made between *simple* homage, which was only an acknowledgment of tenure;[c] and *liege* homage, which included the fealty before-mentioned, and the services consequent upon it. Thus when our Edward III., in 1329, did homage to Philip the Sixth of France, for his ducal dominions on that continent, it was warmly disputed of what species the homage was to be, whether *liege* or *simple* homage.[d] But with us in England, it becoming a settled principle of tenure, that *all* lands in the kingdom are holden of the king as their sovereign and lord paramount, no oath but that of fealty could ever be taken to inferior lords, and the oath of allegiance was necessarily confined to the person of the king alone. By an easy analogy the term of allegiance was soon brought to signify all other engagements, which are due from subjects to their prince, as well as those duties which were simply and merely territorial. And the oath of allegiance, as administered for upwards of six hundred years,[e] contained a promise "to be true and faithful to the king and his heirs, "and truth and faith to bear of life and limb and terrene

Liege and simple homage.

The oath of allegiance.

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[a] 2 *Feud.* 5, 6, 7.

[b] 2 *Feud.* 99.

[c] 7 Rep. Calvin's case, 7.

[d] 2 Carte, 401. Mod. Un. Hist. xxiii. 420.

[e] Mirror, c. 3, §. 35. Fleta. 3. 16 Britton, c. 29. 7 Rep. Calvin's case, 6.

Altered to the present form at the Revolution.

The oath of supremacy.

The oath of abjuration.

"honour, and not to know or hear of any ill or damage in- [368] "tended him, without defending him therefrom." Upon which sir Matthew Hale[f] makes this remark; that it was short and plain, not entangled with long or intricate clauses or declarations, and yet is comprehensive of the whole duty from the subject to his sovereign. But, at the Revolution, the terms of this oath being thought perhaps to favour too much the notion of non-resistance, the present form was introduced by the convention parliament, which is more general and indeterminate than the former; the subject only promising "that he will be faithful and bear *true* allegiance "to the king," without mentioning "his heirs," or specifying in the least wherein that allegiance consists. The oath of supremacy is principally calculated as a renunciation of the pope's pretended authority: and the oath of abjuration, introduced in the reign of king William,[g] very amply supplies the loose and general texture of the oath of allegiance; it recognizing the right of his majesty, derived under the act of settlement; engaging to support him to the utmost of the juror's power, promising to disclose all traitorous conspiracies against him; and expressly renouncing any claim of the descendants of the late pretender, in as clear and explicit terms as the English language can furnish. This oath must be taken by all persons in any office, trust, or employment; and may be tendered by two justices of the peace to any person, whom they shall suspect of disaffection.[h] And the oath of allegiance may be tendered[i] to all persons above the age of twelve years, whether natives, denizens, or aliens, either in the court-leet of the manor, or in the sheriff's tourn, which is the court-leet of the county. But, as we have already seen, a new form of oath has been recently provided, to be taken by Roman Catholics, by the 10 Geo. IV. c. 7, not offensive to their religious belief.[j]

There is also an implied allegiance owing to the sovereign.

But, besides these express engagements, the law also holds that there is an implied, original, and virtual allegiance, owing from every subject to his sovereign, antecedently to any express promise; and although the subject never swore any faith or allegiance in form. For as the king, by the very descent of the crown, is fully invested with all the rights and bound to all the duties of sovereignty, before his coronation; so the subject is bound to his prince by an intrinsic allegiance, before the super-induction of those outward bonds of oath, homage, and fealty: which were only instituted to remind the subject of this his previous duty, and for the better securing its performance.[k] The formal profession therefore, or oath of subjection, is nothing more than a declaration in words of what was before implied in law. Which occasions sir Edward Coke very justly to observe,[l] that "all "subjects are equally bounden to their allegiance, as if they "had taken the oath; because it is written by the finger of "the law in their hearts, and the taking of the corporal oath "is but an outward declaration of the same." The sanction of an oath, it is true, in case of violation of duty, makes the guilt still more accumulated, by superadding perjury to treason: but it does not increase the civil obligation to loyalty; it only strengthens the *social* tie by uniting it with that of *religion*. [370]

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[f] 1 Hal. P. C. 63.

[g] Stat. 13 & 14 Wm. III. c. 6.

[h] Stat. 1 Geo. I. c. 13. 6 Geo. III. c. 53.

[i] 2 Inst. 121. 1 Hal. P. C. 64.

[j] *Ante* p. 157.

Allegiance is natural or local.

Allegiance, both express and implied, is however distinguished by the law into two sorts or species, the one natural, the other local; the former being also perpetual, the latter temporary.

Natural allegiance.

Natural allegiance is such as is due from all men born within the king's dominions immediately upon their birth.[m] For, immediately upon their birth, they are under the king's protection; at a time too, when (during their infancy) they are incapable of protecting themselves. Natural allegiance is therefore a debt of gratitude; which cannot be forfeited, cancelled, or altered, by any change of time, place, or circumstance, nor by any thing but the united concurrence of the legislature.[n] An Englishman who removes to France, or to China, owes the same allegiance to the king of England there as at home, and twenty years hence as well as now. For it is a principle of universal law,[o] that the natural-born subject of one prince cannot by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former: for this natural allegiance was intrinsic, and primitive, and antecedent to the other; and cannot be divested [370] without the concurrent act of that prince to whom it was first due.[p] Indeed the natural-born subject of one prince, to whom he owes allegiance, may be entangled by subjecting himself absolutely to another: but it is his own act that brings him into these straits and difficulties, of owing service to two masters; and it is unreasonable that, by such voluntary act of his own, he should be able at pleasure to unloose those bands, by which he is connected to his natural prince.

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[k] 1 Hal. P. C. 61.

[l] 2 Inst. 121.

[m] 7 Rep. 7.

[n] 2 P. Wms. 124.

[o] 1 Hal. P. C. 68.

Local allegiance. Local allegiance is such as is due from an alien, or stranger born, for so long time as he continues within the king's dominion and protection:[q] and it ceases, the instant such stranger transfers himself from this kingdom to another. Natural allegiance is therefore perpetual, and local temporary only: and that for this reason, evidently founded upon the nature of government; that allegiance is a debt due from the subject, upon an implied contract with the prince, that so long as the one affords protection, so long the other will demean himself faithfully. As therefore the prince is always under a constant tie to protect his natural-born subjects, at all times and in all countries, for this reason their allegiance due to him is equally universal and permanent. But, on the other hand, as the prince affords his protection to an alien, only during his residence in this realm, the allegiance of an alien is confined (in point of time) to the duration of such his residence, and (in point of locality) to the dominions of the British empire. From which considerations sir Matthew Hale[r] deduces this consequence, that, though there be an usurper of the crown, yet it is treason for any subject, while the usurper is in full possession of the sovereignty, to practise any thing against his crown and dignity: wherefore, although the true prince regain the sovereignty, yet such attempts against the usurper (unless in defence or aid of the rightful king) have been afterwards punished with death; because of the breach of that temporary allegiance, which was due to him as king *de facto.* And upon this footing, after Edward IV. recovered the crown, which had been long detained from his house by the line of Lancaster, treasons committed against Henry VI., were capitally punished; though Henry had been declared an usurper by parliament. [371]

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[p] *Doe d. Thomas* v. *Acklam*, 2 B. & C. 779. *Auchmuty* v. *Mulcaster*, 5 B. & C. 771.

[q] 7 Rep. 6.

[r] 1 Hal. P. C. 60.

To whom allegiance is due.

This oath of allegiance, or rather the allegiance itself, is held to be applicable not only to the political capacity of the king, or regal office, but to his natural person, and blood-royal: and for the misapplication of their allegiance, *viz.* to the regal capacity or crown, exclusive of the person of the king, were the Spencers banished in the reign of Edward II.[s] And from hence arose that principle of personal attachment, and affectionate loyalty, which induced our forefathers, (and, if occasion required, would doubtless induce their sons) to hazard all that was dear to them, life, fortune, and family, in defence and support of their liege lord and sovereign.

Allegiance is the duty of all subjects.

This allegiance then, both express and implied, is the duty of all the king's subjects, under the distinctions here laid down, of local and temporary, or universal and perpetual. Their rights are also distinguishable by the same criterions of time and locality; natural-born subjects having a great variety of rights, which they acquire by being born within the king's ligeance, and can never forfeit by any distance of place or time, but only by their own misbehaviour: the explanation of which rights is the principal subject of this volume. The same is also in some degree the case of aliens; though their rights are much more circumscribed, being acquired only by residence here, and lost whenever they remove. I shall however here endeavour to chalk out some of the principal lines, whereby they are distinguished from natives, descending to farther particulars when they come in course.

Aliens, what they may do.

An alien born may purchase lands, or other estates: but not for his own use; for the king is thereupon entitled to them.[t] If an alien could acquire a permanent property in lands, he must owe an allegiance, equally permanent with that property, to the king of England; which would probably be inconsistent with that, which he owes to his own [372] natural liege lord: besides that thereby the nation might in time be subject to foreign influence, and feel many other inconveniences. Wherefore by the civil law such contracts were also made void:[u] but the prince had no such advantage of forfeiture thereby, as with us in England. Among other reasons, which might be given for our constitution, it seems to be intended by way of punishment for the alien's presumption, in attempting to acquire any landed property: for the vendor is not affected by it, he having resigned his right, and received an equivalent in exchange. Yet an alien may acquire a property in goods, money, and other personal estate, or may hire a house for his habitation:[v] for personal estate is of a transitory and moveable nature; and, besides, this indulgence to strangers is necessary for the advancement of trade. Aliens also may trade as freely as other people; only they were subject to certain higher duties at the custom-house, but these are now almost entirely done away:[w] and there are also some obsolete statutes of Henry VIII., prohibiting alien artificers to work for themselves in this kingdom; but it is generally held that they were virtually repealed by statute 5 Eliz. c. 7.[x] Also an alien may bring an action concerning personal property, and may make a will, and dispose of his personal estate:[y] not as it was in France, where the king at the death of an alien was entitled to all he was worth, by the *droit d'aubaine* or *jus albinatus*,[z] unless he had a peculiar exemption. The French law is now however assimilated to ours in this respect.[a] When I mention these rights of an alien, I must be understood of alien-friends only, or such whose countries are in peace with ours; for alien-enemies have no rights, no privileges, unless by the king's special favour, during the time of war.

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[s] 1 Hal. P. C. 67.

[t] Co. Lit. 2.

Who is an alien, and

When I say, that an alien is one who is born out of the king's dominions, or allegiance, this also must be understood with some restrictions. The common law indeed stood absolutely so; with only a very few exceptions: so that a particular act of parliament became necessary after the Restoration,[b] "for the naturalization of children of his "majesty's English subjects, born in foreign countries "during the late troubles." And this maxim of the law proceeded upon a general principle, that every man owes natural allegiance where he is born, and cannot owe two such allegiances, or serve two masters, at once. Yet the children of the king's ambassadors born abroad were always held to be natural subjects:[c] for as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is sent; so, with regard to the son also, he was held (by a kind of *postliminium*) to be born under the king of England's allegiance, represented by his father, the ambassador. To encourage also foreign commerce, it was enacted by statute 25 Edw. III. st. 2, that all children born abroad, provided *both* their parents were at the time of his birth in allegiance to the king, and the mother had passed the seas by her husband's consent, might inherit as if born in England: and accordingly it hath been so adjudged in behalf of merchants.[d] But by several more modern statutes,[e] these restrictions are still farther taken off: so that all children, born out of the king's ligeance, whose *fathers* (or *grandfathers* by the father's side) were natural-born subjects, are now deemed to be natural-born subjects themselves, to all intents and purposes; unless their said ancestors were attainted, or banished beyond sea, for high treason; or were at the birth of such children in the service of a prince at enmity with Great Britain. Yet the grandchildren of such ancestors shall not be privileged in respect of the alien's duty, except they be protestants, and actually reside within the realm; nor shall be enabled to claim any estate or interest, unless the claim be made within five years after the same shall accrue.

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[u] *Cod. l.* 11 *tit.* 55.

[v] 7 Rep. 17.

[w] See *ante* 330.

[x] But there does not seem any other authority for this but Blackstone's 1 Woodе. Lec. 273, n. 1.

[y] Lutw. 34.

[z] A word derived from *alibi natus*. Spelm. Gl. 24.

[a] Code Civil, *l.* 1, tit. 1, art. 11, and *l.* 3, tit. 1, art. 726.

who a natural born subject.

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[b] Stat. 29 Car. II. c. 6.

[c] 7 Rep. 18.

[d] Cro. Car. 601. Mar. 91. Jenk. Cent. 3.

[e] 7 Ann. c. 5. 4 Geo. II. c. 21, and 13 Geo. III. c. 21.

The children of aliens are natural-born subjects.

The children of aliens, born here in England, are, generally speaking, natural-born subjects, and entitled to all the privileges of such. In which the constitution of France differed from ours; for there, by their *jus albinatus*, when it existed, if a child were born of foreign parents, it was an alien.[f] But the law in this respect is now nearly the same as ours.[g]

Denizen, what he may do.

[374]

A denizen is an alien born, but who has obtained *ex donatione regis* letters patent to make him an English subject: a high and incommunicable branch of the royal prerogative.[h] A denizen is in a kind of middle state, between an alien and natural-born subject, and partakes of both of them. He may take lands by purchase or devise, which an alien may not; but cannot take by inheritance:[i] for his parent, through whom he must claim, being an alien, had no inheritable blood; and therefore could convey none to the son. And, upon a like defect of hereditary blood, the issue of a denizen, born *before* denization, cannot inherit to him; but his issue born *after*, may.[j] [k]A denizen is not excused[l] from paying the alien's duty, and some other mercantile burthens, but these are now much lessened.[m] And no denizen can be of the privy council, or either house of parliament, or have any office of trust, civil or military, or be capable of any grant of lands, &c. from the crown.[n]

Naturalization, how performed.

Naturalization cannot be performed but by an act of parliament: for by this an alien is put in exactly the same state as if he had been born in the king's ligeance; except only that he is incapable, as well as a denizen, of being a member of the privy council, or parliament, holding offices, grants, &c.[o] No bill for naturalization can be received in either house of parliament, without such disabling clause in it:[p] nor without a clause disabling the person from obtaining any immunity in trade thereby, in any foreign country; unless he shall have resided in Britain for seven years next after the commencement of the session in which he is naturalized.[q] Neither can any person be naturalized or restored in blood, unless he hath received the sacrament of the lord's supper within one month before the bringing in of the bill; and unless he also takes the oaths of allegiance and supremacy in the presence of the parliament.[r] But these provisions have been usually dispensed with by special acts of parliament, previous to bills of naturalization of any foreign princes or princesses.[s]

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[f] Jenk. Cent. 3, cites *Treasure François*, 312.

[g] Code Civil, lib. 1, tit. 1, art. 9. As to what must be done by an alien on arriving in this country, see *ante* p. 273.

[h] 7 Rep. Calvin's case, 25.

[i] 11 Rep. 67.

[j] Co Litt. 8. Vaugh. 285.

[k] See as to where a denizen may inherit, *Principles of Real Property*, p. 162.

[l] Stat. 22 Hen. VIII. c. 8.

[m] See *ante* p. 330.

[n] Stat. 12. Wm. III. c. 2.

[o] *Ibid.*

[p] Stat 1 Geo. I. c. 4.

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Frequent attempts at a general naturalization act.

These are the principal distinctions between aliens, denizens, and natives: distinctions, which it hath been frequently endeavoured since the commencement of this century to lay almost totally aside, by one general naturalization act for all foreign protestants. An attempt which was once carried into execution by the statute 7 Ann. c. 5, but this, after three years experience of it, was repealed by the statute 10 Ann. c. 5, except one clause, which was just now mentioned, for naturalizing the children of English parents born abroad. However, every foreign seaman, who in time of war serves two years on board an English ship by virtue of the king's proclamation, is *ipso facto* naturalized under the like restrictions as in statute 12 Wm. III. c. 2;[t] and all foreign Protestants, and Jews, upon their residing seven years in any of the American colonies, without being absent above two months at a time, and all foreign Protestants serving two years in a military capacity there, or being three years employed in the whale fishery, without afterwards absenting themselves from the king's dominions for more than one year, and none of them falling within the incapacities declared by statute 4 Geo. II. c. 21, shall be (upon taking the oaths of allegiance and abjuration, or in some cases, an affirmation to the same effect) naturalized to all intents and purposes, as if they had been born in this kingdom; except as to sitting in parliament or in the privy council, and holding offices or grants of lands, &c. from

Partial acts on this subject.

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[q] Stat. 14 Geo. III. c. 84.

[r] Stat. 7 Jac. I. c. 2.

[s] Stat. 4 Ann. c. 1. 7 Geo. II. c. 3. 9 Geo. II. c. 24. 4 Geo. III. c. 4.

[t] Stat. 13 Geo. II. c. 3.

the crown within the kingdoms of Great Britain or Ireland.[u] They therefore are admissible to all other privileges, which Protestants or Jews born in this kingdom are entitled to. What those privileges are, with respect to Jews[v] in particular, was the subject of very high debates about the time of the famous Jew-bill;[w] which enables all Jews to prefer bills of naturalization in parliament, without receiving the sacrament, as ordained by statute 7 Jac. 1. It is not my intention to revive this controversy again; for the act lived only a few months, and was then repealed:[x] therefore peace be now to its *manes*. It is to be observed, however, that frequent attempts have recently been made to place the Jews, so far as civil privileges are concerned, on the same footing as their other fellow subjects.[y]

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[u] Stat. 13 Geo. II. c. 7. 20 Geo. II. c. 44. 22 Geo. II. c. 45. 2 Geo. III. c. 25. 13 Geo. III. c. 25.

[v] A pretty accurate account of the Jews till their banishment in 8 Edw. I. may be found in Prynne's *demurrer*, and in Molloy, *de jure Maritimo*, b. 3, c. 6.

[w] Stat. 26 Geo. II. c. 26.

[x] Stat. 27 Geo. II. c. 1.

[y] See further as to Jews, *ante* p. 363.

CHAPTER THE ELEVENTH.

OF THE CLERGY.

THE people, whether aliens, denizens, or natural-born subjects are divisible into two kinds; the clergy and laity: the clergy, comprehending all persons in holy orders, and in ecclesiastical offices, will be the subject of the following chapter. [376]

People divisible into two kinds, clergy and laity.

The clergy, their privileges.

This venerable body of men, being separate and set apart from the rest of the people, in order to attend the more closely to the service of almighty God, have thereupon large privileges allowed them by our municipal laws: and had formerly much greater, which were abridged at the time of the Reformation on account of the ill use which the popish clergy had endeavoured to make of them. For, the laws having exempted them from almost every personal duty, they attempted a total exemption from every secular tie. But it is observed by sir Edward Coke,[a] that, as the overflowing of waters doth many times make the river to lose its proper channel, so in times past ecclesiastical persons, seeking to extend their liberties beyond their true bounds, either lost or enjoyed not those which of right belonged to them. The personal exemptions do indeed for the most part continue. A clergyman cannot be compelled to serve on a jury, nor to appear at a court-leet or view of frank pledge; which almost every other person is obliged to do:[b] but if a layman is summoned on a jury, and before the trial takes orders, he shall notwithstanding appear and be sworn.[c] Neither can he be

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[a] 2 Inst. 4.

[b] F. N. B. 160. 2 Inst. 4.

[c] 4 Leon. 190.

[377] chosen to any temporal office; as bailiff, reeve, constable, or the like: in regard of his own continual attendance on the sacred function.[d] During his attendance on divine service, *eundo, morando et redeundo* he is privileged from arrests in civil suits.[e] In cases also of felony, a clerk in orders had formerly the benefit of his clergy, without being branded in the hand; and might likewise have had it more than once: in both which particulars he was distinguished from a layman;[f] but this benefit of clergy was entirely abolished by the 7 Geo. IV. c. 28, s. 6: as they have their privileges, so also the clergy have their disabilities, on account of their spiritual avocations. **Their disabilities.** Clergymen, we have seen,[g] are incapable of sitting in the house of commons; and by statute 21 Hen. VIII. c. 13, were not (in general) allowed to take any lands or tenements to farm, upon pain of 10*l. per* month, and total avoidance of the lease; nor upon like pain to keep any tanhouse or brewhouse; nor should engage in any manner of trade, nor sell any merchandize, under forfeiture of the treble value. Which prohibition is consonant to the canon law. However, by the statute 57 Geo. III. c. 99, spiritual persons beneficed or performing spiritual duties, might take to farm eighty acres of land, but no more, without the written consent of the bishop of the diocese; but, by the same act, the same persons were forbidden to carry on any trade or dealing for profit upon pain of forfeiting the value of the goods by them bought to sell again, and their contracts in any such trade or dealing were declared to be utterly void. And it has very recently been determined[h] that a joint stock banking company is within the meaning of this last statute, and that a contract made with a banking company, of which any spiritual persons were partners or members was void. This decision having excited much alarm among persons interested in these and other similar companies, it has been enacted by the 1 & 2 Vict. c. 10, s. 1, that no association or co-partnership then formed, or which might be formed before the end of the next session of

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[d] Finch. L. 88.

[e] Stat. 50 Edw. III. c. 5. 1 Ric. II. c. 15.

[f] 2 Inst. 637. Stat. 4 Hen VII. c. 13, and 1 Edw. VI. c. 12,

[g] Page 181.

[h] *Hall* v. *Franklin*, 3 Mee. & W. 252.

parliament, (that is the session 1839), nor any contract entered into by any of them shall be illegal or void, or occasion any forfeiture by reason of any spiritual person being or having been a member, manager or director. And by a subsequent statute of the same session, 1 & 2 Vict. c. 106, after repealing the 57 Geo. III. c. 77, it is enacted (s. 28), that spiritual persons are not to take a farm for occupation above eighty acres, without the consent of the bishop, and then not beyond seven years, under a penalty of 40*s.* an acre, and by s. 29, that no spiritual person shall engage in trade, or buy, or sell, or deal for profit, "unless in any case in "which such trading or dealing shall have been or shall be "carried on by or on behalf of any number of partners ex-"ceeding six, or in any case in which any trade or dealing "shall have devolved, or shall devolve, upon any spiritual "person, or upon any other person for him, or to his use, "under or by virtue of any devise or bequest, &c.: but in "none of the foregoing excepted cases shall it be lawful "for such spiritual person to act as a director or managing "partner, or to carry on such trade or dealing as aforesaid, "in person." But by s. 30, this is not to extend to spiritual persons engaged in keeping a school, or as tutors, or in respect of any thing done, or any buying or selling in such employment, or to selling any thing *bonâ fide* bought for the use of the family, or to disposing of books by means of a bookseller, or to being a manager or director in any benefit society, or life or fire assurance society. Spiritual persons illegally trading may be suspended, and for the third offence deprived, (s. 31).

In the frame and constitution of ecclesiastical polity there are divers ranks and degrees: which I shall consider in their respective order, merely as they are taken notice of by the secular laws of England; without intermeddling with the canons and constitutions, by which the clergy have bound themselves. And under each division I shall consider, 1. The method of their appointment; 2. Their rights and duties; and 3. The manner wherein their character or office may cease.

Division of the subject of this chapter.

I. An archbishop or bishop is elected by the chapter of his cathedral church, by virtue of a licence from the crown.

I. The archbishop and bishops were formerly elective.

Election was, in very early times, the usual mode of elevation to the episcopal chair throughout all christendom; and this was promiscuously performed by the laity as well as the clergy:[i] till at length it becoming tumultuous, the emperors
[378] and other sovereigns of the respective kingdoms of Europe took the appointment in some degree into their own hands: by reserving to themselves the right of confirming these elections, and of granting investiture of the temporalities, which now began almost universally to be annexed to this spiritual dignity: without which confirmation and investiture, the elected bishop could neither be consecrated nor receive any secular profits. This right was acknowledged in the emperor Charlemagne, *A. D.* 773, by pope Hadrian I., and the council of Lateran,[j] and universally exercised by other christian princes: but the policy of the court of Rome at the same time began by degrees to exclude the laity from any share in these elections, and to confine them wholly to the clergy, which at length was completely effected; the mere form of election appearing to the people to be a thing of little consequence, while the crown was in possession of an absolute negative, which was almost equivalent to a direct right of nomination. Hence the right of appointing to bishopricks is said to have been in the crown of England[k] (as well as other kingdoms in Europe) even in the Saxon times; because the rights of confirmation and investiture were in effect (though not in form) a right of complete donation.[l] But when, by length of time, the custom of making elections by the clergy only was fully established, the popes began to except to the usual method of granting these investitures, which was *per annulum et baculum*, by the prince's delivering to the prelate a ring, and pastoral staff or crosier; pretending, that this was an encroachment on the church's authority, and an attempt by these symbols to confer a

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[i] *Per clerum et populum.* Palm. 25. 2 Roll. Rep. 102. M. Paris, *A. D.* 1095.

[j] *Decret.* 1 *dist.* 63, *c.* 22.

[k] Palm. 28.

[l] "*Nulla electio prælatorum (sunt "verba Ingulphi) erat mere libera et "canonica; sed omnes dignitates tam "episcoporum, quam abbatum, per an"nulum et baculum regis curia pro "sua complacentia conferebat." Penes clericos et monachos fuit electio, sed electum a rege postulabant.* Selden. *Jan. Aug.* l. 1, §. 39.

spiritual jurisdiction: and pope Gregory VII. towards the close of the eleventh century, published a bulle of excommunication against all princes who should dare to confer investitures, and all prelates who should venture to receive them.[m] This was a bold step towards effecting the plan then adopted by the Roman see, of rendering the clergy entirely [379] independent of the civil authority: and long and eager were the contests occasioned by this papal claim. But at length, when the emperor Henry V. agreed to remove all suspicion of encroachment on the spiritual character, by conferring investitutes for the future *per sceptrum* and not *per annulum et baculum;* and when the kings of England and France consented also to alter the form in their kingdoms, and receive only homage from the bishops for their temporalities, instead of investing them by the ring and crosier; the court of Rome found it prudent to suspend for a while its other pretentions.[n]

The concession made by Henry I. and John.

This concession was obtained from king Henry the first in England, by means of that obstinate and arrogant prelate, archbishop Anselm:[o] but king John (about a century afterwards) in order to obtain the protection of the pope against his discontented barons, was also prevailed upon to give up by a charter, to all the monasteries and cathedrals in the kingdom, the free right of electing their prelates, whether abbots or bishops: reserving only to the crown the custody of the temporalities during the vacancy; the form of granting a licence to elect, (which is the original of our *conge d'eslire*) on refusal whereof the electors might proceed without it; and the right of approbation afterwards, which was not to be denied without a reasonable and lawful cause.[p] This grant was expressly recognized and confirmed in king John's *magna carta*,[q] and was again established by statute 25 Edw. III. st. 6, s. 3.

By 25 Hen. VIII. the right of nomination restored to the crown, where it now exists.

But by statute 25 Hen. VIII. c. 20, the ancient right of nomination was, in effect, restored to the crown: it being enacted that, at every future avoidance of a bishoprick, the king may send the dean and chapter his usual licence to proceed to election; which is always to be accompanied with a letter missive from the king, containing the name of the person whom he would have them elect: and, if the dean and chapter delay their election above twelve days, the nomination [380] shall devolve to the king, who may by letters patent appoint such person as he pleases. This election or nomination, if it be of a bishop, must be signified by the king's letters patent to the archbishop of the province; if it be of an archbishop, to the other archbishop and two bishops, or to four bishops; requiring them to confirm, invest, and consecrate the person so elected: which they are bound to perform immediately, without any application to the see of Rome. After which the bishop elect shall sue to the king for his temporalities, shall make oath to the king and none other, and shall take restitution of his secular possessions out of the king's hands only. And if such dean and chapter do not elect in the manner by this act appointed, or if such archbishop or bishop do refuse to confirm, invest, and consecrate such bishop elect, they shall incur all the penalties of a *præmunire*. But this statute does not apply to the five bishopricks created by Hen. VIII. subsequently to its passing, out of the ruins of the monasteries, which are, Bristol, Gloucester, Chester, Peterborough and Oxford, nor to the bishopricks created by virtue of the 6 & 7 Wm. IV. c. 77, which are Ripon and Manchester, all these are pure donatives in form as in substance.[r]

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[m] *Decret.* 2 *caus.* 16, *qu.* 7, *c.* 12 & 13.

[n] Mod. Un. Hist. xxv. 363. xxix. 115.

[o] M. Paris, *A. D.* 1107.

[p] M. Paris, *A. D.* 1214. 1 Rym. *Fœd.* 198.

[q] *Cap.* 1, *edit. Oxon.* 1759.

The archbishop, his duty, power, and privileges.

An archbishop is the chief of the clergy in a whole province; and has the inspection of the bishops of that province, as well as of the inferior clergy, and may deprive them on notorious cause.[s] The archbishop has also his own diocese, wherein he exercises episcopal jurisdiction; as in his province he exercises archiepiscopal. As archbishop, he, upon receipt of the king's writ, calls the bishops and clergy of his province to meet in convocation: but without the king's writ he cannot assemble them.[t] To him all appeals are made from inferior jurisdictions within his province; and, as an appeal lies from the bishops in person to him in person, so it also lies from the consistory courts of each diocese to his archiepiscopal court. During the vacancy of any see in his province, he is guardian of the spiritualities thereof, as the king is of the temporalities; and he executes all ecclesiastical jurisdiction therein. If an archiepiscopal see be vacant, the dean and chapter are the spiritual guardians, ever since the office of prior of Canterbury was abolished at the Reformation.[u] The archbishop is entitled to present by lapse to all the ecclesiastical livings in the disposal of his diocesan bishops, if not filled within six months. And the [381] archbishop has a customary prerogative, when a bishop is consecrated by him, to name a clerk or chaplain of his own to be provided for by such suffragan bishop: in lieu of which it is now usual for the bishop to make over by deed to the archbishop, his executors and assigns, the next presentation of such dignity or benefice in the bishop's disposal within that see, as the archbishop himself shall choose; which is therefore called his *option* :[v] which options are only binding on the bishop himself who grants them, and not on his successors. The prerogative itself seems to be derived from the legatine power formerly annexed by the popes to the metropolitan of Canterbury.[w] And we may add, that the papal claim itself (like most others of that encroaching see) was probably set up in imitation of the imperial prerogative called *primæ* or *primariæ preces;* whereby the emperor exercises, and hath immemorially exercised,[x] a right of naming to the first prebend that becomes vacant after his accession in every church of the empire.[y] A right, that was also exercised by the crown of England in the reign of Edward I.;[z] and which probably gave rise to the royal corodies which were mentioned in a former chapter.[a] It is likewise the privilege, by custom, of the archbishop of Canterbury, to crown the kings and queens of this kingdom. And he hath also by the statute 25 Hen. VIII. c. 21, the power of granting dispensations in any case, not contrary to the holy scriptures and the law of God, where the pope used formerly to grant them: which is the foundation of his granting special licences, to marry at any place or time, to hold two livings, and the like; and on this also is founded the right he exercises of conferring degrees, in prejudice of the two universities.[b] The power of the archbishop to grant dispensations to hold two benefices is now regulated by the 1 & 2 Vict. c. 106, s. 6.

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[r] See Harg. Co. Litt. 95, n. 3, and 134.

[s] Lord Raym. 541.

[t] 4 Inst. 322, 323.

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[u] 2 Roll. Abr. 22.

[v] Cowel's interp. tit. *Option.*

[w] Sherlock of Options, 1.

[x] Goldast. *constit. imper. tom.* 3, page 406.

[y] Dufresne, V. 806. Mod. Univ. Hist. xxix. 5.

[z] *Rex, &c. salutem. Scribatis episcopo Karl quod—Roberto de Icard pensionem suam, quam ad preces regis prædicto Roberto concessit, de cætero solvat; et de proxima ecclesia vacatura de collatione prædicti episcopi, quam ipse Robertus acceptaverit, respiciat. Brev.* 11 Edw. I. 3 Pryn. 1264.

[a] Ch. 8, page 295.

[382] **The bishop, his duty and power.** The power and authority of a bishop, besides the administration of certain holy ordinances peculiar to that sacred order, consist principally in inspecting the manners of the people and clergy, and punishing them in order to reformation, by ecclesiastical censures. To this purpose he has several courts under him, and may visit at pleasure every part of his diocese. His chancellor is appointed to hold his courts for him, and to assist him in matters of ecclesiastical law; who, as well as all other ecclesiastical officers, if lay or married, must be a doctor of the civil law, so created in some university.[c] It is also the business of a bishop to institute, and to direct induction, to all ecclesiastical livings in his diocese.

How archbishopricks and bishopricks become void. Archbishopricks and bishopricks may become void by death, deprivation for any very gross and notorious crime, and also by resignation. All resignations must be made to some superior.[d] Therefore a bishop must resign to his metropolitan; but the archbishop can resign to none but the king himself.

Alterations made by 6 & 7 Wm. IV. c. 77, in bishopricks. Some very considerable alterations have been made as to archbishopricks and bishopricks by a very recent statute, of which I shall now give some account. The great object of this statute (6 & 7 Wm. IV. c. 77), is to to equalize the revenues and territories of the bishopricks and for this purpose a commission to be called "The Ecclesiastical Commissioners for England," is established for the purpose of carrying the recommendations in the reports of the ecclesiastical commissioners, as to these points, into effect. The commission is composed of the present archbishops of Canterbury and York, the present bishops of London, Lincoln, and Gloucester, and the lord chancellor, the president of the council, the first lord of the treasury, and the chancellor of the exchequer, and one secretary of state for the time being, and certain other persons. The commissioners are incorporated, (s. 1); and vacancies are to be supplied by the king, (s. 2). The commissioners are to subscribe a declaration, (s. 3); are to appoint a treasurer and secretary, (s. 7), and are from time to time to lay schemes before the king in council for carrying into effect the recommendations of the Report, (s. 10): and the king in council may thereupon make orders for carrying such schemes into effect, (s. 12). It will be seen that the powers of this commission are very considerable. I will state therefore what are the recommendations which are to be carried into effect. These are recited in the act. In the first place, they are intended to make considerable alterations in the existing dioceses, removing and altering many towns and districts from one to the other, with the view of equalizing the duties of the several bishops. These details, although of great local interest, need not be here mentioned, except the following. The principal intended alterations are to unite the sees of Bangor and St. Asaph into one, and the sees of Gloucester and Bristol into one, and to diminish considerably the sees of York and Chester. It is further proposed that two new sees shall be erected in the province of York, one at Manchester and the other at Ripon; and that the diocese of Manchester shall consist of the whole county of Lancaster, except the deanery of Furnes and Cartmel; and that the diocese of Ripon consist of that part of the county of York, which is now in the diocese of Chester, of the deanery of Craven and of such parts of the deaneries of the Ainsty and Pontefract, in the county and diocese of York, as lie to the westward of the following districts, *videlicit*, the liberty of the Ainsty, and the wapentakes of Barkston Ash, Osgoldcross and Staincross. All parishes which are locally situate in one diocese, but under the jurisdiction of the bishop of another diocese, are to be made subject to the jurisdiction of the bishop of the diocese, within which they are locally situate: and such variations are to be made in the proposed boundaries of the different dioceses, as may appear advisable, after more precise information respecting the circumstances of particular parishes or districts. The bishops of the two newly erected sees are to be made bodies corporate, and to be invested with all the same rights and privileges as are now possessed by the other bishops of England and Wales; and are to be made subject to the metropolitan jurisdiction of the archbishop of York. The collegiate churches of Manchester and Ripon are to be made the cathedrals, and the chapters thereof are to be the chapters of the respective sees of Manchester and Ripon, and to be invested with all the rights and powers of other cathedral chapters; and the members of these and of all other cathedral churches in England, are to be styled deans and canons. The bishops of the see of St. Asaph and Bangor are to be elected alternately by the dean and chapter of St. Asaph, and by the dean and chapter of Bangor; and the bishops of the see of Bristol and Gloucester, are to be elected alternately by the dean and chapter of Bristol, and by the dean and chapter of Gloucester.

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[b] See the bishop of Chester's case, Oxon. 1721.

[c] Stat. 37 Hen. VIII. c. 17.

[d] Gibs. Cod. 822.

Income of the archbishopricks and bishopricks.

Such alterations are to be made in the apportionment or exchange of ecclesiastical patronage among the several bishops, as shall be consistent with the relative magnitude and importance of their dioceses when newly arranged, and as shall afford an adequate quantity of patronage to the bishops of the new sees; and in order to provide for the augmentation of the incomes of the smaller bishopricks, such fixed annual sums are to be paid to the commissioners, out of the revenues of the larger sees respectively, as shall upon due inquiry and consideration be determined upon, so as to leave as an average annual income to the archbishop of Canterbury 15,000*l.*, to the archbishop of York 10,000*l.*, to the bishop of London 10,000*l.*, to the bishop of Durham 8,000*l.*, to the bishop of Winchester 7,000*l.*, to the bishop of Ely 5,500*l.*, to the bishop of St. Asaph and Bangor 5,200*l.*, and to the bishop of Worcester, and Bath and Wells respectively 5,000*l.*, and that out of the fund thus accruing, fixed annual payments be made by the commissioners, in such instances and to such amount as shall be in like manner determined on, so that the average annual incomes of the other bishops respectively be not less than 4,000*l.*, nor more than 5,000*l.*, and at the expiration of every seven years, recokoning from the first day of January, 1837, a new return of the revenues of all the bishopricks is to be made to the commissioners; and that thereupon the scale of episcopal payments and receipts shall be revised, so as to preserve, as nearly as may be, to each bishop, an amount of income equivalent to that which shall have been determined, in the first instance, to be suitable to the circumstances of his bishoprick; and such revised scale shall take effect, as to each see respectively, upon the then next avoidance thereof.[e]

Progress made in effecting the objects of the ecclesiastical commission.

Since this act was passed considerable progress has been made towards the completion of the alterations contemplated by it. Orders in council having from time to time been issued for carrying the recommendations of the commissioners into effect. The sees of Gloucester and Bristol have been united, and the bishoprick of Ripon has been erected.[f] The see of Lincoln has been augmented,[g] and many other minor alterations have been made: but the whole of the proposed scheme cannot be fully carried into operation for many years, one effect of the act will be to alter the number of dioceses in the two provinces, as the province of Canterbury will have two less than formerly, and the province of York two more.[h]

II. Dean and chapter, their duty and power.

II. A dean and chapter are the council of the bishop, to assist him with their advice in affairs of religion, and also in the temporal concerns of his see.[i] When the rest of the clergy were settled in the several parishes of each diocese (as hath formerly[k] been mentioned) these were reserved for the celebration of divine service in the bishop's own cathedral; and the chief of them who presided over the rest, obtained the name of *decanus* or dean, being probably at first appointed to superintend *ten* canons or prebendaries.

How deans are elected.

All ancient deans are elected by the chapter, by *conge d'eslire* from the king, and letters missive of recommendation; in the same manner as bishops: but in those chapters, that were founded by Henry VIII. out of the spoils of the dissolved monasteries, the deanery is donative, and the installation merely by the king's letters patent.[k] The [383] chapter, consisting of canons or prebendaries, are sometimes appointed by the king, sometimes by the bishop, and sometimes elected by each other.

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[e] By one of the recommendations of the ecclesiastical commissioners, the bishoprick of Sodor and Man was to be united to that of Carlisle. This, however is not to be carried into effect. See *ante* p. 101, n. p.

[f] See order in council, 11 Dec. 1837, and 1 Feb. 1838. Parl. paper, 179, sess. 1838.

[g] Order in council, 4 April, 1838. Parl. paper, 423, sess. 1838.

[h] See *ante* p. 107.

[i] 3 Rep. 75. Co. Litt. 103, 300.

[k] Page 109.

The dean and chapter are the nominal electors of the bishop.

The dean and chapter are, as was before observed, the nominal electors of a bishop. The bishop is their ordinary and immediate superior; and has, generally speaking the power of visiting them, and correcting their excesses and enormities. They had also a check on the bishop at common law: for till the statute 32 Hen. VIII. c. 28, his grant or lease would not have bound his successors, unless confirmed by the dean and chapter.[m]

How deaneries and prebends become void.

Deaneries and prebends may become void, like a bishoprick, by death, by deprivation, or by resignation to either the king or the bishop.[n] Also I may here mention, once for all, that if a dean, prebendary, or other spiritual person be made a bishop, all the preferments of which he was before possessed are void; and the king may present to them in right of his prerogative royal. But they are not void by the election, but only by the consecration.[o]

III. Archdeacon.

III. An archdeacon hath an ecclesiastical jurisdiction, immediately subordinate to the bishop, throughout the whole of his diocese, or in some particular part of it. And by the statute 6 & 7 Wm. 4, c. 77, s. 19, every archdeacon throughout England and Wales shall have the same jurisdiction within his respective archdeaconry, any usage to the contrary notwithstanding. He is usually appointed by the bishop himself; and hath a kind of episcopal authority, originally derived from the bishop, but now independent and distinct from his.[p] He therefore visits the clergy; and has his separate court for punishment of offenders by spiritual censures, and for hearing all other causes of ecclesiastical cognizance.

IV. Rural deans.

IV. The rural deans are very ancient officers of the church,[q] but almost grown out of use; though their deaneries still subsist as an ecclesiastical division of the

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[l] Gibs. Cod. 173.

[m] Co. Lit. 103.

[n] Plowd. 498.

[o] Bro. *Abr.* tit. *Presentation*, 3, 61. Cro. Eliz. 542, 790. 2 Roll. Abr. 352. 4 Mod. 200. Salk. 137.

[p] 1 Burn, Eccl. Law, 68, 69.

[q] Kennet, Parl. Antiq. 633.

diocese, or archdeaconry. They seem to have been deputies of the bishop, planted all round his diocese, the better to inspect the conduct of the parochial clergy, to inquire [384] into and report dilapidations, and to examine the candidates for confirmation; and armed, in minuter matters, with an inferior degree of judicial and coercive authority.[r]

V. Parsons and vicars.

V. The next, and indeed the most numerous, order of men in the system of ecclesiastical polity, are the parsons and vicars of churches: in treating of whom I shall first mark out the distinction between them; shall next observe the method by which one may become a parson or vicar; shall then briefly touch upon their rights and duties; and shall, lastly, shew how one may cease to be either.

Parson, his power and duty.

A parson, *persona ecclesiæ*, is one that hath full possession of all the rights of a parochial church. He is called parson, *persona*, because by his person the church, which is an invisible body, is represented; and he is in himself a body corporate, in order to protect and defend the rights of the church (which he personates) by a perpetual succession.[s] He is sometimes called the rector, or governor, of the church: but the appellation of *parson*, (however it may be depreciated by familiar, clownish, and indiscriminate use) is the most legal, most beneficial, and most honourable title that a parish priest can enjoy: because such a one, (sir Edward Coke observes) and he only, is said *vicem seu personam ecclesiæ gerere*. A parson has, during his life, the freehold in himself of the parsonage house, the glebe, the tithes, and other dues. But these are sometimes *appropriated;* that is to say, the benefice is perpetually annexed to some spiritual corporation, either sole or aggregate, being the patron of the living; which the law esteems equally capable of providing for the service of the church, as any single private clergyman. This contrivance seems to have sprung from the policy of the monastic orders, who have never been deficient in subtle inventions for the increase of their own power and emoluments. At the first establishment of parochial clergy, the tithes of the parish were distributed in a four-fold division; one for the use of

Appropriation.

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[r] Gibs. Cod. 972, 1550.

[s] Co. Litt. 300.

the bishop, another for maintaining the fabrick of the church, [385] a third for the poor, and the fourth to provide for the incumbent. When the sees of the bishops became otherwise amply endowed, they were prohibited from demanding their usual share of these tithes, and the division was into three parts only. And hence it was inferred by the monasteries, that a small part was sufficient for the officiating priest; and that the remainder might well be applied to the use of their own fraternities, (the endowment of which was construed to be a work of the most exalted piety) subject to the burthen of repairing the church and providing for its constant supply. And therefore they begged and bought, for masses and obits, and sometimes even for money, all the advowsons within their reach, and then appropriated the benefices to the use of their own corporation. But, in order to complete such appropriation effectually, the king's licence, and consent of the bishop, must first be obtained: because both the king and the bishop may sometime or other have an interest, by lapse, in the presentation to the benefice; which can never happen if it be appropriated to the use of a corporation, which never dies: and also because the law reposes a confidence in them, that they will not consent to any thing that shall be to the prejudice of the church. The consent of the patron also is necessarily implied, because (as was before observed) the appropriation can be originally made to none, but to such spiritual corporation, as is also the patron of the church; the whole being indeed nothing else, but an allowance for the patrons to retain the tithes and glebe in their own hands, without presenting any clerk, they themselves undertaking to provide for the service of the church.[t] When the appropriation is thus made, the appropriators and their successors are perpetual parsons of the church; and must sue and be sued, in all matters concerning the rights of the church, by the name of parsons.[u]

How the church may become disappropriate. This appropriation may be severed, and the church become disappropriate, two ways: as, first, if the patron or appropriator presents a clerk, who is instituted and inducted to the parsonage: for the incumbent so instituted and inducted is to all intents and purposes complete parson; and the appropriation, being once severed, can never be re-united again, unless by a repetition of the same solemnities.[v] And, [386] when the clerk so presented is distinct from the vicar, the rectory thus vested in him becomes what is called a *sinecure;* because he hath no cure of souls, having a vicar under him to whom that cure is committed.[w] Also, if the corporation which has the appropriation is dissolved, the parsonage becomes disappropriate at common law; because the perpetuity of person is gone, which is necessary to support the appropriation.

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[t] Plowd. 496—500.

[u] Hob. 307.

How appropriations may now be made.

In this manner, and subject to these conditions, may appropriations be made at this day: and thus were most, if not all, of the appropriations at present existing originally made; being annexed to bishopricks, prebends, religious houses, nay, even to nunneries, and certain military orders, all of which were spiritual corporations. At the dissolution of monasteries by statutes 27 Hen. VIII. c. 28, and 31 Hen. VIII. c. 13, the appropriations of the several parsonages, which belonged to those respective religious houses, (amounting to more than one-third of all the parishes in England[x]) would have been by the rules of the common law disappropriated; had not a clause in those statutes intervened, to give them to the king in as ample a manner as the abbots, &c. formerly held the same, at the time of their dissolution. This, though perhaps scarcely defensible, was not without example; for the same was done in former reigns, when the alien priories (that is, such as were filled by foreigners only) were dissolved and given to the crown.[y] And from these two roots have sprung all the lay appropriations or secular parsonages, which we now see in the kingdom; they having been afterwards granted out from time to time by the crown.[z]

Vicar, how generally appointed.

These appropriating corporations, or religious houses, were wont to depute one of their own body to perform divine service, and administer the sacraments, in those parishes of which the society was thus the parson. This [387] officiating minister was in reality no more than a curate, deputy, or vice-gerent of the appropriator, and therefore called *vicarius* or *vicar*. His stipend was at the discretion of the appropriator, who was however bound of common right to find somebody, *qui illi de temporalibus, episcopo de spiritualibus, debeat respondere.*[a] But this was done in so scandalous a manner, and the parishes suffered so much by the neglect of the appropriators, that the legislature was forced to interpose: and accordingly it is enacted by statute 15 Ric. II. c. 6, that in all appropriations of churches, the diocesan bishop shall ordain (in proportion to the value of the church) a competent sum to be distributed among the poor parishioners annually; and that the vicarage shall be *sufficiently* endowed. It seems the parish were frequently sufferers, not only by the want of divine service, but also by withholding those alms, for which, among other purposes, the payment of tithes was originally imposed: and therefore in this act a pension is directed to be distributed among the poor parochians, as well as a sufficient stipend to the vicar. But he, being liable to be removed at the pleasure of the appropriator, was not likely to insist too rigidly on the legal sufficiency of the stipend; and therefore by statute 4 Hen. IV. c. 12, it is ordained, that the vicar shall be a secular person, not a member of any religious house; that he shall be vicar perpetual, not removable at the caprice of the monastery; and that he shall be canonically instituted and inducted, and be sufficiently endowed, at the discretion of the ordinary, for these three express purposes, to do divine service, to inform the people, and to keep hospitality. The endowments in consequence of these statutes have usually been by a portion of the glebe, or land, belonging to the parsonage, and a particular share of the tithes, which the appropriators found it most troublesome to collect, and which were therefore generally called privy or small tithes; the greater, or predial, tithes being still reserved to their own use. But one and the same rule was not observed in the endowment of all vicarages. Hence some are more liberally, and some more scantily, endowed: and hence the tithes of many things, as wood in particular, were in some parishes rectorial, and in some vicarial tithes. But these distinctions are now abolished by the act commuting all tithes into a rent-charge.[b]

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[v] Co. Litt. 46.

[w] Sinecures might also be created by other means. 2 Burn. Eccl. Law, 347.

[x] Seld. Review of Tithes, c. 9. Spelm. Apology, 35.

[y] 2 Inst. 584.

[z] Sir H. Spelman (of Tithes, c. 29,) says these are now called impropriations, as being *improperly* in the hands of laymen. See *Duke of Portland* v. *Bingham*, 1 Hagg. Rep. 162.

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[a] Seld. Tithes, c. 11, 1.

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The distinction between a parson and a vicar.

The distinction therefore of a parson and vicar is this: the parson has for the most part the whole right to all the ecclesiastical dues in his parish; but a vicar has generally an appropriator over him, entitled to the best part of the profits, to whom he is in effect perpetual curate, with a standing salary. Though in some places the vicarage has been considerably augmented by a large share of the great tithes; which augmentations were greatly assisted by the statute 29 Car. II. c. 8, enacted in favour of poor vicars and curates, which rendered such temporary augmentations (when made by the appropriators) perpetual.

Four things necessary to becoming a parson or vicar. 1. Holy orders.

The method of becoming a parson or vicar is much the same. To both there are four requisites necessary: holy orders; presentation; institution; and induction. The method of conferring the holy orders of deacon and priest, according to the liturgy and canons,[c] is foreign to the purpose of this work; any farther than as they are necessary requisites to make a complete parson or vicar. By common law, a deacon, of any age, might be instituted and inducted to a parsonage or vicarage: but it was ordained by statute 13 Eliz. c. 12, that no person under twenty-three years of age, and in deacon's orders, should be presented to any benefice with cure; and if he were not ordained priest within one year after his induction, he should be *ipso facto* deprived: and now, by statute 13 & 14 Car. II. c. 4, no person is capable to be admitted to any benefice, unless he hath been first ordained a priest; and then he is, in the language of the law, a clerk in orders; and by statute 44 Geo. III. c. 43, no person shall be admitted a deacon before he shall have attained twenty-three years of age; and no person shall be admitted a priest before he shall have attained the age of twenty-four. But if he obtains orders, or a license to preach, by money or corrupt practices (which seems to be the true, though not the common, notion of simony) the person giving such orders forfeits[d] 40*l.* and the person receiving 10*l.* and is incapable of any ecclesiastical preferment for seven years afterwards.

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[b] 6 & 7 Wm. IV. c. 71.

[c] See 2 Burn. Eccl. Law, 103.

[d] Stat. 31 Eliz. c. 6.

2. Presentation.

Any clerk may be presented[e] to a parsonage or vicarage; that is, the patron, to whom the advowson of the church [389] belongs, may offer his clerk to the bishop of the diocese to be instituted. Of advowsons, or the right of presentation, being a species of private property, this is not a convenient place to treat.[f] But when a clerk is presented, the bishop may refuse him upon many accounts. As, 1, If the patron is excommunicated, and remains in contempt forty days.[g] Or, 2, If the clerk be unfit:[h] which unfitness is of several kinds. First, with regard to his person; as if he be a bastard, an outlaw, an excommunicate, an alien, under age, or the like.[i] Next, with regard to his faith or morals; as for any particular heresy, or vice that is *malum in se:* but if the bishop alleges only in generals, as that he is *schismaticus inveteratus,* or objects a fault that is *malum prohibitum* merely, as haunting taverns, playing at unlawful games, or the like; it is not good cause of refusal.[j] Or, lastly, the clerk may be unfit to discharge the pastoral office for want of learning. In any of which cases the bishop may refuse the clerk. In case the refusal is for heresy, schism, inability of learning, or other matter of ecclesiastical cognizance, there the bishop must give notice to the patron of such his cause of refusal, who, being usually a layman, is not supposed to have knowledge of it; else he cannot present by lapse: but, if the cause be temporal, there he is not bound to give notice.[k]

For what reasons a clerk may be refused.

When the bishop must assign a cause.

If an action at law be brought by the patron against the bishop for refusing his clerk, the bishop must assign the cause. If the cause be of a temporal nature and the fact admitted, (as, for instance, outlawry) the judges of the king's courts must determine its validity, or, whether it be sufficient cause of refusal: but if the fact be denied, it must be determined by a jury. If the cause be of a spiritual nature, (as, heresy, particularly alleged) the fact if denied shall also be determined by a jury; and if the fact be admitted or found, the court upon consultation and advice of learned divines shall decide its sufficiency.[l] If the cause be want of learning, the bishop need not specify in what points the clerk is deficient, but only allege that he is deficient:[m] for the statute 9 Edw. II. s. 1, c. 13, is express, that the examination of the fitness of a person presented to a benefice belongs to the ecclesiastical judge. But because it would be nugatory in this case to demand the reason of refusal from the ordinary, if the patron were bound to abide by his determination, who has already pronounced his clerk unfit; therefore, if the bishop returns the clerk to be *minus sufficiens in literatura*, the court shall write to the metropolitan, to re-examine him, and certify his qualifications; which certificate of the archbishop is final.[n] [390]

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[e] A layman may also be presented; but he must take priest's orders before his admission. 1 Burn. 103.

[f] See *Principles of Real Property,* pp. 4—6.

[g] 2 Roll. Abr. 355.

[h] Glanv. *l.* 13, *c.* 20.

[i] 2 Roll. Abr. 356. 2 Inst. 632. Stat. 3 Ric. II. c. 3. 7 Ric. II. c. 12.

[j] 5 Rep. 58.

[k] 2 Inst. 632.

3. Institution.

If the bishop hath no objections, but admits the patron's presentation, the clerk so admitted is next to be instituted by him; which is a kind of investiture of the spiritual part of the benefice: for by institution the care of the souls of the parish is committed to the charge of the clerk. When a vicar was instituted, he, (besides the usual forms) took, if required by the bishop, an oath of perpetual residence; for the maxim of law was, that *vicarius non habet vicarium:* and, as the non-residence of the appropriators was the cause of the perpetual establishment of vicarages, the law judged it very improper for them to defeat the end of their constitution, and by absence to create the very mischief which they were appointed to remedy: especially as, if any profits were to arise from putting in a curate and living at a distance from the parish, the appropriator, who was the real parson, had undoubtedly the elder title to them. However, by the 57 Geo. III. c. 99, re-enacted by the 1 & 2 Vict. c. 106, s. 61, this oath was abolished. When the ordinary is also the patron, and *confers* the living, the presentation and institution are one and the same act, and are called a collation to a benefice. By institution or collation the church is full, so that there can be no fresh presentation till another vacancy, at least in the case of a common patron; but the church is not full against the king, till induction: nay, even if a clerk is instituted upon the king's presentation, the crown may revoke it before induction, and present another clerk.[o] Upon institution also the clerk may enter on the parsonage house and glebe, and take the tithes; but he cannot grant or let them, or bring an action for them, till induction.

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[l] 2 Inst. 632.

[m] 5 Rep. 58. 3 Lev. 313.

[n] 2 Inst. 632.

[391] 4. Induction. Induction is performed by a mandate from the bishop to the archdeacon, who usually issues out a precept to other clergymen to perform it for him. It is done by giving the clerk corporal possession of the church, as by holding the ring of the door, tolling a bell, or the like; and is a form required by law, with intent to give all the parishioners due notice, and sufficient certainty of their new minister, to whom their tithes are to be paid. This, therefore, is the investiture of the temporal part of the benefice, as institution is of the spiritual. And when a clerk is thus presented, instituted, and inducted into a rectory, he is then, and not before, in full and complete possession, and is called in law *persona impersonata*, or *parson imparsonee*.[p]

The rights and duties of a parson or vicar. The rights of a parson or vicar, in his tithes, and since their commutation in the rent-charge in lieu thereof, and ecclesiastical dues, are not here properly to be considered:[q] and as to his duties, they are principally of ecclesiastical cognizance; those only excepted which are laid upon him by statute. And those are indeed so numerous, that it is impracticable to recite them here with any tolerable conciseness or accuracy. Some of them we may remark, as they arise in the progress of our inquiries, but for the rest I must refer myself to such authors as have compiled treatises expressly upon this subject.[r] I shall only just mention the article of residence, upon the supposition of which the law doth style every parochial minister an incumbent. By statute

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[o] Co. Litt. 344.

[p] Co. Litt. 300.

[q] See *Principles of Real Property*, pp. 6—10.

[r] These are very numerous: but there are few which can be relied on with certainty. Among these are bishop Gibson's *Codex*, Dr. Burn's *Ecclesiastical Law*, and the earlier editions of the *Clergyman's Law*, published under the name of Dr. Watson, but compiled by Mr. Place a barrister.

21 Hen. VIII. c. 13, persons wilfully absenting themselves from their benefices, for one month together, or two months in the year, incurred a penalty of *5l.* to the king, and *5l.* to any person that would sue for the same: except chaplains to the king, or others therein mentioned,[s] during their attendance in the household of such as retained them: and also except[t] all heads of houses, magistrates, and professors in the universities, and all students under forty years of age residing there, *bonâ fide*, for study. Legal residence is not [392] only in the parish, but also in the parsonage house, if there be one: for it hath been resolved,[u] that the statute intended residence, not only for serving the cure, and for hospitality; but also for maintaining the house, that the successor also may keep hospitality there: and, if there be no parsonage house, it hath been holden that the incumbent is bound to hire one, as this is no excuse for residing out of the parish.[v] But by an act of the last session of parliament, passed after great consideration, 1 & 2 Vict. c. 106, the statute 21 Hen. VIII. c. 13, and all other acts on this subject are repealed, and various provisions are made on the subject of residence. Every spiritual person shall keep residence on his benefice, and in the house of residence, if any; and if any person shall without license absent himself for any period exceeding three months, or to be accounted at several times in any one year, he shall, when such absence shall exceed three months, and not exceed six months, forfeit one-third of the annual value of the benefice: and when such absence shall exceed six months and not exceed eight months, one-half of such annual value; and thus according to the length of absence, (s. 32). If the usual house be unfit, the bishop may grant a license to reside in another, (s. 35). But deans, professors at either universities, chaplains of the king and queen, and certain other persons are privileged from residence, (s. 38). If no license be granted, residence may be enforced by prohibition, or the living may be sequestered, (s. 54), and for the more effectual promotion of this important duty among the parochial

Residence.

1 & 2 Vict. c. 106.

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[s] Stat. 25 Hen. VIII. c. 16. 33 Hen. VIII. c. 28.

[t] Stat. 28 Hen. VIII. c. 13.

[u] 6 Rep. 21

[v] *Wilkinson* v. *Allot*, Cowp. 420.

clergy, a provision is made by the statute 17 Geo. III. c. 53, for raising money upon ecclesiastical benefices, to be paid off by annually decreasing instalments, and to be expended in rebuilding or repairing the houses belonging to such benefices. And by the 1 & 2 Vict. c. 106, various provisions are made for building and improving a fit house of residence.[w]

How a parson or vicar may cease to be so.

We have seen that there is but one way, whereby one may become a parson or vicar: there are many ways, by which one may cease to be so. 1, By death. 2, By cession, in taking another benefice. For by statute 21 Hen. VIII. c. 13, if any one having a benefice of 8*l. per annum*, or upwards, (according to the present valuation in the king's books,[x]) accepted any other, the first should be adjudged void, unless he obtained a dispensation; which no one was entitled to have, but the chaplains of the king and others therein mentioned, the brethren and sons of lords and knights, and doctors and bachelors of divinity and law, *admitted by the universities* of this realm. And a vacancy thus made, for want of a dispensation, is called session. But as we have already observed, the statute 21 Hen. VIII. c. 13, has been repealed by the statute 1 & 2 Vict. c. 106, which enacts, that not more than two preferments shall be held together, (s. 2): and no two benefices, unless within ten miles of each other, or if the population of one such benefice is more than 3,000, or the joint yearly value shall exceed 1,000*l.*, (s. 4): and even in this case a license and dispensation must be obtained, (s. 6). Acceptance of any preferment or benefice contrary to the act, vacates the former preferment or benefice, (s. 11). 3. By consecration; for, as was mentioned before,[y] when a clerk is promoted to a bishoprick, all his other [393] preferments are void the instant that he is consecrated. But there was a method, by the favour of the crown, of holding such livings *in commendam*. *Commenda*, or *ecclesia commendata*, was a living commended by the crown to the care of a clerk, to hold till a proper pastor was provided for it.

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[w] See also 55 Geo. III. c. 147, which authorizes an exchange to be made between a rector and a parishioner of part of his glebe lands with the consent of the parson and bishop.

[x] Cro. Car. 456.

[y] Page 412.

This might be temporary for one, two, or three years; or perpetual: being a kind of dispensation to avoid the vacancy of the living, and was called a *commenda retinere.* There was also a *commenda recipere,* which was to take a benifice *de novo,* in the bishop's own gift, or the gift of some other patron consenting to the same; and this was the same to him as institution and induction are to another clerk.[z] But by the 6 & 7 Wm. IV. c. 77, s. 18, no ecclesiastical dignity, office, or benefice, shall be held *in commendam* by any bishop unless he held the same at the time of passing the act. 4. By resignation. But this is of no avail, till accepted by the ordinary; into whose hands the resignation must be made.[a] 5. By deprivation; either, first, by sentence declaratory in the ecclesiastical courts, for fit and sufficient causes allowed by the common law; such as attainder of treason or felony,[b] or conviction of other infamous crime in the king's courts; for heresy, infidelity,[c] gross immorality, and the like: or, secondly, in pursuance of divers penal statutes, which declare the benefice void, for some nonfeasance or neglect, or else some malefeasance or crime. As, for simony;[d] for maintaining any doctrine in derogation of the king's supremacy, or of the thirty-nine articles, or of the book of common-prayer;[e] for neglecting after institution to read the liturgy and articles in the church, or make the declarations against popery, or take the abjuration oath;[f] for using any other form of prayer than the liturgy of the church of England;[g] or for absenting himself sixty days in one year from a benefice belonging to a popish patron, to which the clerk was presented by either of the universities;[h] in all which and similar cases[i] the benefice is *ipso facto* void, without any formal sentence of deprivation.

VI. Curate.

VI. A curate is the lowest degree in the church; being in the same state that a vicar was formerly, an officiating temporary minister, instead of the proper incumbent. Though [394] there are what are called *perpetual* curacies, where all the tithes are appropriated, and no vicarage endowed, (being for some particular reasons[j] exempted from the statute of Hen. IV.) but, instead thereof, such perpetual curate is appointed by the appropriator. With regard to the other species of curates, they are the objects of some particular statutes, which ordain, that such as serve a church during its vacancy shall be paid such stipend as the ordinary thinks reasonable, out of the profits of the vacancy; or, if that be not sufficient, by the successor within fourteen days after he takes possession:[k] and by the stat. 12 Ann. st. 2, c. 12, it was enacted, that, if any rector or vicar nominated a curate to the ordinary to be licensed to serve the cure in his absence, the ordinary should settle his stipend under his hand and seal, not exceeding *50l. per annum*, nor less than *20l.*, and on failure of payment may sequester the profits of the benefice. But this last act has been repealed, and the act, to which reference has already been made in this chapter, the 1 & 2 Vict. c. 106, contains various provisions[l] for the benefit and regulation of this deserving class of the clergy. In the first place the residence of the curate is enforced, (s. 76). And if his duty is inadequately performed, the bishop may appoint a curate, but the incumbent may appeal to the archbishop, (s. 77). In large benefices the bishop may require an assistant curate to be appointed, but here also an appeal to the archbishop is given, (s. 78). Perhaps however the most important provision is that which authorizes the bishop to appoint a stipend to every curate of a non-resident incumbent, and to regulate it according to the amount and nature of the duty, (s. 83—105).

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[z] Hob. 144.
[a] Cro. Jac. 198.
[b] Dyer, 108. Jenk. 210.
[c] Fitz. *Abr.* tit. *Trial.* 54.
[d] Stat. 13 Eliz. c. 6. 12 Ann. c. 12.
[e] Stat. 1 Eliz. c. 1 & 2. 13 Eliz. c. 12.
[f] Stat. 13 Eliz. c. 12. 14 Car. II. c. 4. 1 Geo. I. c. 6.
[g] Stat. 1 Eliz. c. 2.
[h] Stat. 1 W. & M. c. 26.
[i] 6 Rep. 29, 30.

Thus much of the clergy, properly so called. There are also certain inferior ecclesiastical officers of whom the common law takes notice; and that, principally, to assist the ecclesiastical jurisdiction, where it is deficient in powers. On which officers I shall make a few cursory remarks.

VII. Churchwardens. VII. Churchwardens are the guardians or keepers of the church, and representatives of the body of the parish.[m] They are sometimes appointed by the minister, sometimes by the parish, sometimes by both together, as custom directs. They are taken, in favour of the church, to be for some purposes a kind of corporation at the common law;[n] that is, they are enabled by that name to have a property in goods and chattels, and to bring actions for them, for the use and profit of the parish. Yet they may not waste the church goods, but may be removed by the parish, and then called to account by action at the common law; but there is no method of calling them to account, but by first removing them; for none can legally do it, but those who are put in their place. As to lands, or other real property, as the church, churchyard, &c., they have no sort of interest [395] therein; but if any damage is done thereto, the parson only or vicar shall have the action. Their office also is to repair the church, and make rates and levies for that purpose: but these are recoverable only in the ecclesiastical court. Although where the validity of the rate is not disputed, and the rate in arrear does not exceed 10*l.*, a summary method of recovering them is given by the 53 Geo. III. c. 127. They were also, before the recent alteration in the law,[o] joined with the overseers in the care and maintenance of the poor. They are to levy[p] a shilling forfeiture on all such as do not repair to church on Sundays and holidays, and are empowered to keep all persons orderly while there; to which end it has been held that a churchwarden may justify the pulling off a man's hat, without being guilty of either an assault or trespass.[q] There are also a multitude of other petty parochial powers committed to their charge by divers acts of parliament.[r]

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[j] 1 Burn. Eccl. Law, 427.

[k] Stat. 28 Hen. VIII. c. 11.

[l] Many of these provisions were also contained in the prior statute, 57 Geo. III. c. 99, repealed by the last act.

VIII. Parish clerks. VIII. Parish clerks and sextons are also regarded by the common law; as persons who have freeholds in their offices; and therefore though they may be punished, yet they cannot be deprived, by ecclesiastical censures.[s] The parish clerk was formerly very frequently in holy orders, and some are so, says Blackstone, to this day. He is generally appointed by the incumbent, but by custom may be chosen by the inhabitants; and if such custom appears, the court of king's bench will grant a *mandamus* to the archdeacon to swear him in, for the establishment of the custom turns it into a temporal or civil right.[t]

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[m] In Sweden they have similar officers, whom they call *kiorckiowariandes*. Stiernhook, *l.* 3, *c.* 7.

[n] But see the opinion of Lord Kenyon, *contra*, *Witnell* v. *Gartham*, 6 T. R. 396; *Rex* v. *Beeston*, 3 T. R. 594.

[o] See *ante*, p. 387.

[p] Stat. 1 Eliz. c. 2.

[q] 1 Lev. 196.

[r] See Lambard of churchwardens, at the end of his *eirenarcha*; and Dr. Burn, tit. *church, churchwardens, visitations*.

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[s] 2 Roll. Abr. 234.

[t] Cro. Car. 589. *King* v. *Warren*, Cowp. 370. As to sextons having a freehold. See *Rex* v. *Churchwardens of Thame*, Str. 115.

CHAPTER THE TWELFTH.

OF THE CIVIL STATE.

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[396]

THE lay part of his majesty's subjects, or such of the people as are not comprehended under the denomination of clergy, may be divided into three distinct states, the civil, the military, and the maritime.

The laity divided into the civil, the military, and the maritime.

That part of the nation which falls under our first and most comprehensive division, the civil state, includes all orders of men from the highest nobleman to the meanest peasant, that are not included under either our former division of clergy, or under one of the two latter, the military and maritime states: and it may sometimes include individuals of the other three orders; since a nobleman, a knight, a gentleman, or a peasant, may become either a divine, a soldier, or a seaman.

The civil state

The civil state consists of the nobility and the commonalty. Of the nobility, the peerage of Great Britain, or lords temporal, as forming (together with the bishops,) one of the supreme branches of the legislature, I have before sufficiently spoken: we are here to consider them according to their several degrees, or titles of honour.

consists of the nobility and the commonalty.

All degrees of nobility and honour are derived from the king as their fountain:[a] and he may institute what new titles he pleases. Hence it is that all degrees of nobility are not of equal antiquity. Those now in use are dukes, marquesses, earls, viscounts and barons.[b]

The nobility.

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[a] 4 Inst. 363.

[b] For the original of these titles on the continent of Europe, and their subsequent introduction into this island, see Mr. Selden's *Tit. of Honour*.

[397] 1. Duke. 1. A *duke*, though he be with us, in respect of his title of nobility, inferior in point of antiquity to many others, yet is superior to all of them in rank; his being the first title of dignity after the royal family.[c] Among the Saxons the Latin name of dukes, *duces*, is very frequent, and signified, as among the Romans, the commanders or leaders of their armies, whom in their own language they called Heꞃetoᵹa[d]; and in the laws of Henry I. (as translated by Lambard) we find them called *heretochii*. But after the Norman conquest, which changed the military polity of the nation, the kings themselves continuing for many generations *dukes* of Normandy, they would not honour any subjects with the title of duke, till the time of Edward III.; who, claiming to be king of France, and thereby losing the ducal in the royal dignity, in the eleventh year of his reign created his son, Edward the black prince, duke of Cornwall: and many, of the royal family especially, were afterwards raised to the like honour. However, in the reign of queen Elizabeth, *A. D.* 1572,[e] the whole order became utterly extinct; but it was revived about fifty years afterwards by her successor, who was remarkably prodigal of honours, in the person of George Villiers duke of Buckingham.

2. Marquess. 2. A *marquess, marchio*, is the next degree of nobility. His office formerly was (for dignity and duty were never separated by our ancestors) to guard the frontiers and limits of the kingdom; which were called the marches, from the teutonic word, *marche*, a limit: such as, in particular, were the marches of Wales and Scotland, while each continued to be an enemy's country. The persons, who had command there, were called lords marchers, or marquesses; whose authority was abolished by statute 27 Hen. VIII. c. 27, so far as Wales was concerned: though the title had long before been made a mere ensign of honour; Robert Vere, earl of Oxford, being created marquess of Dublin, by Richard II. in the eighth year of his reign.[f]

[398] 3. Earl. 3. An *earl* is a title of nobility so ancient, that its original

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[c] Camden. Britan. *tit. ordines.*

[d] This is apparently derived from the same root as the German herzog, the appellation of dukes in that country. Seld. tit. hon. 2, i. 12.

[e] Camden. Britan. *tit. ordines.* Spelman, *Gloss.* 191.

[f] 2 Inst. 5.

cannot clearly be traced out. Thus much seems tolerably certain: that among the Saxons they were called *ealdormen, quasi* elder men, signifying the same as *senior* or *senator* among the Romans; and also *schiremen,* because they had each of them the civil government of a several division or shire. On the irruption of the Danes, they changed the name to *eorles,* which, according to Camden,[g] signified the same in their language. In Latin they are called *comites* (a title first used in the empire) from being the king's attendants: "*a societate nomen sumpferunt, reges enim tales sibi* "*associant.*"[h] After the Norman conquest they were for some time called *counts* or *countees,* from the French; but they did not long retain that name themselves, though their shires are from thence called counties to this day. The name of *earls* or *comites* is now become a mere title, they have nothing to do with the government of the county; which, as has been more than once observed, is now entirely devolved on the sheriff, the earl's deputy, or *vice-comes.* In writs, and commissions, and other formal instruments, the king, when he mentions any peer of the degree of an earl, usually styles him "trusty and well-beloved *cousin:*" an appellation as ancient as the reign of Henry IV.: who being either by his wife, his mother, or his sisters, actually related or allied to every earl then in the kingdom, artfully and constantly acknowledged that connexion in all his letters and other public acts: from whence the usage has descended to his successors, though the reason has long ago failed.

4. The name of *vice-comes* or *viscount* was afterwards made use of as an arbitrary title of honour, without any shadow of office pertaining to it by Henry the sixth; when, in the eighteenth year of his reign, he created John Beaumont a peer, by the name of viscount Beaumont, which was the first instance of the kind.[i] 4. Viscount.

5. A *baron's* is the most general and universal title of nobility; for originally every one of the peers of superior rank had also a barony annexed to his other titles.[j] But it hath [399] sometimes happened that, when an ancient baron hath been raised to a new degree of peerage, in the course of a few 5. Baron.

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[g] Britan. *tit ordines.* See also *Turner's Angl. Sax.* b. viii. c. 7.

[h] Bracton, *l.* 1, *c.* 8. Flet. *l.* 1, *c.* 5.

[i] 2 Inst. 5.

[j] 2 Inst. 5, 6.

generations the two titles have descended differently; one perhaps to the male descendants, the other to the heirs general; whereby the earldom or other superior title hath subsisted without a barony: and there are also modern instances where earls and viscounts have been created without annexing a barony to their other honours: so that now the rule doth not hold universally, that all peers are barons. The original and antiquity of baronies have occasioned great inquiries among our English antiquaries. The most probable opinion seems to be, that they were the same with our present lords of manors; to which the name of court baron (which is the lord's court, and incident to every manor) gives some countenance. It may be collected from king John's *magna carta*,[k] that originally all lords of manors, or barons, that held of the king *in capite*, had seats in the great council or parliament: till about the reign of that prince the conflux of them became so large and troublesome, that the king was obliged to divide them, and summon only the greater barons in person; leaving the small ones to be summoned by the sheriff, and (as it is said) to sit by representation in another house; which gave rise to the separation of the two houses of parliament.[l] By degrees the title came to be confined to the greater barons, or lords of parliament only; and there were no other barons among the peerage but such as were summoned by writ, in respect of the tenure of their lands or baronies, till Richard the second first made it a mere title of honour, by conferring it on divers persons by his letters patent.[m]

Manner in which peers are created. Having made this short inquiry into the original of our several degrees of nobility, I shall next consider the manner in which they may be created. The right of peerage seems to have been originally territorial; that is, annexed to lands, honors, castles, manors, and the like, the proprietors and [400] possessors of which were (in right of those estates) allowed How far by tenure. to be peers of the realm, and were summoned to parliament to do suit and service to their sovereign: and, when the land was alienated, the dignity passed with it as appendant. Thus the bishops still sit in the house of lords in right of succession to certain ancient baronies annexed, or supposed to be annexed, to their episcopal lands:[n] and thus, in 2 Hen. VI., the possession of the castle of Arundel was adjudged to confer an earldom on its possessor.[o] But afterwards, when alienations grew to be frequent, the dignity of peerage was confined to the lienage of the party ennobled, and instead of territorial became personal. Actual proof of a tenure by barony became no longer necessary to constitute a lord of parliament; but the record of the writ of summons to him or his ancestors was admitted as a sufficient evidence of the tenure.

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[k] *Cap.* 14.

[l] Gilb. Hist. of the Exch. c. 3. Seld. tit. of Hon. 2, 5, 21.

[m] 1 Inst. 9 Seld. *Jan. Angl.* 2, §. 66.

By writ and by patent.

Peers are now created either by writ, or by patent: for those who claim by prescription must suppose either a writ or patent made to their ancestors; though by length of time it is lost. The creation by writ, or the king's letter, is a summons to attend the house of peers, by the style and title of that barony, which the king is pleased to confer: that by patent is a royal grant to a subject of any dignity and degree of peerage. The creation by writ is the more ancient way; but a man is not ennobled thereby, unless he actually take his seat in the house of lords: and some are of opinion that there must be at least two writs of summons, and a sitting in two distinct parliaments, to evidence an hereditary barony:[p] and therefore the most usual, because the surest, way is to grant the dignity by patent, which enures to a man and his heirs according to the limitations thereof, though he never himself makes use of it.[q] Yet it is frequent to call up the eldest son of a peer to the house of lords by writ of summons, in the name of his father's barony: because in that case there is no danger of his children's losing the nobility in case he never takes his seat: for they will succeed to their grandfather. Creation by writ has also one advantage over that by patent: for a person created by writ holds the dignity to him *and his heirs*, [401] without any words to that purport in the writ; but in letters patent there must be words to direct the inheritance, else the dignity enures only to the grantee for life.[r] For a man or woman may be created noble for their own lives, and the dignity not descend to their heirs at all, or descend only to some particular heirs: as where a peerage is limited to a man, and the heirs male of his body by Elizabeth his present lady, and not to such heirs by any former or future wife.

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[n] Glan. *l.* 7, *c.* 1.

[o] Seld. *Tit. of Hon.* b. 2, c. 9. § 5. See also the Berkeley Peerage case.

[p] Whitelocke of Parl. ch. 114.

[q] Co. Litt. 16.

[r] Co. Litt. 9, 16. See 1 Woodes, 37.

Incidents to the nobility. Let us next take a view of a few of the principal incidents attending the nobility, exclusive of their capacity as members of parliament, and as hereditary counsellors of the crown; both of which we have before considered. And first we must observe, that in criminal cases a nobleman shall be tried **To be tried by their peers.** by his peers; but this privilege does not extend to misdemeanors.[s] The great are always obnoxious to popular envy: were they to be judged by the people, they might be in danger from the prejudice of their judges; and would moreover be deprived of the privilege of the meanest subjects, that of being tried by their equals, which is secured to all the realm by *magna carta*, c. 29. It is said, that this does not extend to bishops: who, though they are lords of parliament, and sit there by virtue of their baronies which they hold *jure ecclesiæ*, yet are not ennobled in blood, and consequently not peers with the nobility.[t] As to peeresses, there was no precedent for their trial when accused of treason or felony, till after Eleanor duchess of Gloucester, wife to the lord protector, was accused of treason and found guilty of witchcraft, in an ecclesiastical synod, through the intrigues of cardinal Beaufort. This very extraordinary trial gave occasion to a special statute, 20 Hen. VI. c. 9, which declares[u] the law to be, that peeresses, either in their own right or by marriage, shall be tried before the same judicature as other peers of the **The effect of the marriage of a noblewoman.** realm. If a woman, noble in her own right, marries a commoner, she still remains noble, and shall be tried by her peers: but if she be only noble by marriage, then by a second marriage with a commoner, she loses her dignity; for as by marriage it is gained, by marriage it is also lost.[v] [402] Yet if a duchess dowager marries a baron, she continues a duchess still; for all the nobility are *pares*, and therefore it is no degradation.[v] A peer, or peeress, (either in her own right or by marriage) cannot be arrested in civil cases:[w] and they have also many peculiar privileges annexed to their peerage in the course of judicial proceedings. A peer sitting in judgment, gives not his verdict upon oath, like an ordinary juryman, but upon his honour,[x] he answers also to bills in chancery upon his honour, und not upon his oath;[y] but, when he is examined as a witness either in civil or criminal cases, he must be sworn:[z] for the respect, which the law shews to the honour of a peer, does not extend so far as to overturn a settled maxim, that *in judicio non creditur nisi juratis*,[a] which has however been recently much relaxed.[b] The honour of peers is however so highly tendered by the law, that it is much more penal to spread false reports of them and certain other great officers of the realm, than of other men: scandal against them being called by the peculiar name of *scandalum magnatum*, and subjected to peculiar punishments by divers ancient statutes.[c]

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[s] 3 Inst. 30. 2 Hawk 424.

[t] 3 Inst. 30, 31.

[u] Moor. 769. 2 Inst. 50. 6 Rep. 52. Staundf. P. C. 152.

[v] Dyer, 79. Co. Litt. 16.

A peer or peeress cannot be arrested.

When a peer gives his honour in judicial proceedings.

Scandalum magnatum.

A peer cannot loose his nobility, but by death or attainder; though there was an instance in the reign of Edward the fourth, of the degradation of George Nevile duke of Bedford by act of parliament,[d] on account of his poverty, which rendered him unable to support his dignity.[e] But this is a singular instance: which serves at the same time, by having happened, to shew the power of parliament: and, by having happened but once, to shew how tender the parliament hath been, in exerting so high a power. It hath been said indeed,[f] that if a baron wastes his estate, so that he is not able to support the degree, the *king* may degrade him: but

A peer cannot loose his nobility.

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[v] 2 Inst. 50.

[w] Finch. L. 355. 1 Ventr. 298.

[x] 2 Inst. 49.

[y] 1 P. Wms. 146.

[z] Salk. 512.

[a] Cro. Car. 64.

[b] 7 & 8 Wm. III. c. 34. 3 & 4 Wm. IV. c. 49. 5 & 6 Wm. IV. c. 62. 1 & 2 Vict. c. 15.

[c] 3 Edw. I. c. 34. 2 Ric. II. st. 1, c. 5. 12 Ric. 2, c. 11.

[d] 4 Inst. 355.

[e] The preamble to the act is remarkable; "forasmuch as oftentimes "it is seen, that when any lord is "called to high estate, and hath not "convenient livelyhood to support the "same dignity, it induceth great po"verty and indigence, and causeth "oftentimes great extortion, embra"cery, and maintenance to be had; "to the great trouble of all such "countries where such estate shall "happen to be: therefore, &c."

[f] Moor. 678.

it is expressly held by later authorities,[g] that a peer cannot be degraded but by act of *parliament*. The rank of Scotch and Irish peers was regulated, as we have already seen,[h] at the respective unions of those countries with England.

[403] The commonalty are

The commonalty, like the nobility, are divided into several degrees: and, as the lords, though different in rank, yet all of them are peers in respect of their nobility, so the commoners, though some are greatly superior to others, yet all are in law peers, in respect of their want of nobility.[i]

(*vidames*, now obsolete.)

The first name of dignity, next beneath a peer, was anciently that of *vidames*, *vice-domini*, or *valvasors*:[j] who are mentioned by our ancient lawyers[k] as *viri magnæ dignitatis*; and sir Edward Coke[l] speaks highly of them. Yet they are now quite out of use; and our legal antiquaries are not agreed upon even their original or ancient office.

Knights of the garter.

Knights banneret.

Baronets.

Now therefore the first personal dignity, after the nobility, is a *knight* of the order of St. George, or *of the garter*; first instituted by Edward III. *A. D.* 1344.[m] Next (but not till after certain *official* dignities, as privy counsellors, the chancellors of the exchequer and duchy of Lancaster, the chief justice of the king's bench, the master of the rolls, and the other English judges) follows a *knight banneret*; who indeed by statutes 5 Ric. II. st. 2, c. 4, and 14 Ric. II. c. 11, is ranked next after barons: and his precedence before the younger sons of viscounts was confirmed to him by order of king James I., in the tenth year of his reign.[n] But, in order to entitle himself to this rank, he must have been created by the king in person, in the field, under the royal banners, in time of open war.[o] Else he ranks after *baronets*; who are the next order; which title is a dignity of inheritance, created by letters patent, and usually descendible to the issue male. It was first instituted by king James the first, *A. D.* 1611, in order to raise a competent sum for the reduction of the province of Ulster in Ireland; for which reason all

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[g] 12 Rep. 107. 12 Mod. 56.

[h] See *ante*, pp. 89, and n. [h]. and 97.

[i] 2 Inst. 29.

[j] Camden. *Britan. t. ordines.*

[k] Bracton. *l.* 1, *c.* 8.

[l] 2 Inst. 667.

[m] Seld. *Tit. of Hon.* 2, 5, 41.

[n] *Ibid.* 2, 11, 3.

[o] 4 Inst. 6.

Knights of the bath.

Other orders.

Knights bachelors.

baronets have the arms of Ulster superadded to their family coat. Next follow *knights of the bath;* an order instituted by king Henry IV. and revived by king George the first. They [401] are so called from the ceremony of bathing, the night before their creation. A new order of knighthood, the *Guelphic* or Hanoverian order, was instituted by king William the Fourth. It has however received no accession since it was originally created, and it is not intended I believe to perpetuate it. There is also the Scotch order of the *Thistle,* and the Irish order of *St. Patrick.* The last of these inferior nobility are *knights bachelors;* the most ancient, though the lowest, order of knighthood amongst us: for we have an instance [p] of king Alfred's conferring this order on his son Athelstan. The custom of the ancient Germans was to give their young men a shield and a lance in the great council: this was equivalent to the *toga virilis* of the Romans: before this they were not permitted to bear arms, but were accounted as part of the father's household: after it, as part of the community.[q] Hence some derive the usage of knighting, which has prevailed all over the western world, since its reduction by colonies from those northern heroes. Knights are called in Latin *equites aurati: aurati,* from the gilt spurs they wore; and *equites,* because they always served on horseback; for it is observable,[r] says Blackstone, that almost all nations call their knights by some appellation derived from an horse.[s] They are also called in our law *milites,* because they formed a part of the royal army, in virtue of their feudal tenures: one condition of which was, that every one who held a knight's fee immediately under the crown (which in Edward the second's time [t] amounted to 20*l. per annum*) was obliged to be knighted, and attend the king in his wars, or fine for his noncompliance. The exertion of this prerogative, as an expedient to raise money in the reign of Charles the first, gave great offence: though warranted by law, and the recent example of queen Elizabeth: but it was by the statute 16 Car. I. c. 20, abolished; and this kind of knighthood has, since that time, fallen into great disregard.

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[p] Will. Malmsb. *lib.* 2

[q] Tac. *de Morib. Germ.* 13.

[r] Camd. *ibid..* Co. Litt. 74.

[s] However, the word knight is derived from the Saxon word cnihꞇ signifying *puer, servus,* or attendant 2 Seld. *Tit. Hon.* c. 5, s. 33. Turn. *Angl. Sax.* book vii. ch. xii. The German word **knecht** has the same meaning at the present day.

[t] Stat. *de milit.* 1 Edw. II.

These, sir Edward Coke says,[u] are all the names of *dignity* in this kingdom, esquires and gentlemen being only names of *worship*. But before these last the heralds rank all [405] colonels, serjeants at law, and doctors in the three learned professions.[v]

Colonels, serjeants and doctors.

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[u] 2 Inst. 667.

[v] The rules of precedence in England may be reduced to the following table: in which those marked* are entitled to the rank here allotted them, by statute 31 Hen. VIII. c. 10—marked †, by stat. 1 W. & M. c. 21.—marked ‖, by letters patent 9, 10 & 14 Jac. I. which see in Seld. *Tit. of Hon.* II. 5, 46, and II. 11, 3.—marked ‡, by ancient usage and established custom; for which see (among others) Camden's Brittannia, *tit. ordines.* Milles's *Catalogue of Honour, edit.* 1610, and Chamberlayne's present state of England, b. 3, ch. 3.

TABLE OF PRECEDENCE.

- * The king's children and grand children.
- * ———— brethren.
- * ———— uncles.
- * ———— nephews.
- * Archbishop of Canterbury.
- * Lord chancellor or keeper, if a baron.
- * Archbishop of York.
- * Lord treasurer.
- * Lord president of the council.
- * Lord privy seal.

if barons.

- * Lord great chamberlain. But see private stat. 1 Geo. I. c. 3.
- * Lord high constable.
- * Lord marshal.
- * Lord admiral.
- * Lord steward of the household.
- * Lord chamberlain of the household.

above all peers of their own degree.

- * Dukes.
- * Marquesses.
- ‡ Dukes' eldest sons.
- * Earls.
- ‡ Marquesses' eldest sons.
- ‡ Dukes' younger sons.
- * Viscounts.
- ‡ Earls' eldest sons.
- ‡ Marquesses' younger sons.
- * Secretary of state, if a bishop.
- * Bishop of London.
- * ———— Durham.
- * ———— Winchester.
- * Bishops.
- * Secretary of state, if a baron.
- * Barons.
- † Speaker of the house of commons.
- † Lords commissioners of the great seal.
- ‡ Viscounts' eldest sons.
- ‡ Earls' younger sons.
- ‡ Barons' eldest sons.
- ‖ Knights of the garter.
- ‖ Privy counsellors.
- ‖ Chancellor of the exchequer.
- ‖ Chancellor of the duchy.
- ‖ Chief justice of the king's bench.
- ‖ Master of the rolls.
- ‖ Vice chancellor.[a]

[a] 53 Geo. III. c. 24, s. 4.

[406] **Esquires.**

Esquires and gentlemen are confounded together by sir Edward Coke, who observes,[w] that every esquire is a gentleman, and a gentleman is defined to be one *qui arma gerit,* who bears coat armour, the grant of which adds gentility to a man's family: in like manner as civil nobility, among the Romans, was founded in the *jus imaginum,* or having the image of one ancestor at least, who had borne some curule office. It is indeed a matter somewhat unsettled, what constitutes the distinction, or who is a real *esquire:* for it is not an estate, however large, that confers this rank upon its owner. Camden, who was himself a herald, distinguishes them the most accurately; and he reckons up four sorts of them:[x] 1. The eldest sons of knights, and their eldest sons, in perpetual succession:[y] 2. The eldest sons of younger sons of peers, and their eldest sons, in like perpetual succession: both which species of esquires sir Henry Spelman entitles *armigeri netalitii.*[z] 3. Esquires created by the king's letters patent, or other investiture: and their eldest sons. 4. Esquires by virtue of their offices, as justices of the peace, and others who bear any office of trust under the

[w] 2 Inst. 668.

[x] *Ibid.*

[y] 2 Inst. 667.

[z] Gloss. 43.

‖ Chief justice of the common pleas.
‖ Chief baron of the exchequer.
‖ Judges, and barons of the coif.
‖ Judges of the court of review.[a]
‖ Knights bannerets, royal.
‖ Viscounts' younger sons.
‖ Barons' younger sons.
‖ Baronets.
‖ Knights bannerets.
‡ Knights of the Bath.
‡ Knights bachelors.
‖ Baronets' eldest sons.
‖ Knights' eldest sons.
‖ Baronets' younger sons.
‖ Knights' younger sons.
‡ Colonels.
‡ Serjeants at law.
‡ Doctors.
‡ Esquires.
‡ Gentlemen.
‡ Yeoman.
‡ Tradesmen.
‡ Artificers.
‡ Labourers.

N. B. Married women and widows are entitled to the same rank among each other, as their husbands would respectively have borne between themselves, except such rank is merely professional or official;—and unmarried women to the same rank as their eldest brothers would bear among men, during the lives of their fathers.

[a] 1 & 2 Wm. IV. c. 56.

crown. To these may be added the esquires of knights of the bath, each of whom constitutes three at his installation: and all foreign peers:[a] for not only these, but the eldest sons of peers of Great Britain, though frequently titular lords, are only esquires in the law, and must be so named in all legal proceedings.[b] As for *gentlemen*, says sir Thomas Smith,[c] they be made good cheap in this kingdom: for whosoever studieth the laws of the realm, who studieth in the universities, who professeth the liberal sciences, and (to be short) who can live idly, and without manual labour, and will bear the port, charge, and countenance of a gentleman, he shall be called master, and shall be taken for a gentleman. A *yeoman* is he that hath free land of forty shillings by the year; who was anciently thereby qualified to serve on juries, vote for knights of the shire, and do any other act, where the law requires one that is *probus et legalis homo.*[d]

Gentlemen.

Yeoman.

Tradesmen, artificers, and labourers.

The rest of the commonalty are *tradesmen*, *artificers*, and *labourers;* who, (as well as all others) must in pursuance of the statute 1 Hen. V. c. 5, be styled by the name and addition of their estate, degree, or mystery, and the place to which they belong, or where they have been conversant, in all original writs of actions personal, appeals, and indictments, upon which process of outlawry may be awarded; in order, as it should seem, to prevent any clandestine or mistaken outlawry, by reducing to a specific certainty the person who is the object of its process.

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[a] Blackstone mentioned Irish peers as ranking only with foreign peers, but this was altered on the union, see *ante*, p. 98.

[b] 3 Inst. 30. 2 Inst. 667.

[c] Commonw. of Eng. b. 1, c. 20.

[d] 2 Inst. 668.

CHAPTER THE THIRTEENTH.

OF THE MILITARY AND MARITIME STATES.

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[408] **The military state.**

THE military state includes the whole of the soldiery; or, such persons as are peculiarly appointed among the rest of the people for the safeguard and defence of the realm.

Dangers attending the possesson of arms in a free state.

In a land of liberty it is extremely dangerous to make a distinct order of the profession of arms. In absolute monarchies this is necessary for the safety of the prince, and arises from the main principle of their constitution, which is that of governing by fear; but in free states the profession of a soldier, taken singly and merely as a profession, is justly an object of jealousy. In these no man should take up arms, but with a view to defend his country and its laws: he puts not off the citizen when he enters the camp; but it is because he is a citizen, and would wish to continue so, that he makes himself for a while a soldier. The laws therefore and constitution of these kingdoms know no such state as that of a perpetual standing soldier, bred up to no other profession than that of war: and it was not till the reign of Henry VII., that the kings of England had so much as a guard about their persons.

[409] **The history of the army in England.**

In the time of our Saxon ancestors, as appears from Edward the confessor's laws,[a] the military force of this kingdom was in the hands of the dukes or heretochs, who were constituted through every province and county in the kingdom; being taken out of the principal nobility, and such as were most remarkable for being "*sapientes, fideles, et animosi.*"

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[a] *C. de heretochiis.*

Their duty was to lead and regulate the English armies, with a very unlimited power; "*prout eis visum fuerit, ad honorem* "*coronæ et utilitatem regni.*" And because of this great power they were elected by the people in their full assembly, or folkmote, in the same manner as sheriffs were elected: following still that old fundamental maxim of the Saxon constitution, that where any officer was intrusted with such power, as if abused might tend to the oppression of the people, that power was delegated to him by the vote of the people themselves.[b] So too, among the ancient Germans, the ancestors of our Saxon forefathers, they had their dukes, as well as kings, with an independent power over the military, as the kings had over the civil state. The dukes were elective, the kings hereditary: for so only can be consistently understood that passage of Tacitus,[c] "*reges ex nobilitate,* "*duces ex virtute sumunt;*" in constituting their kings, the family or blood royal was regarded; in choosing their dukes or leaders, warlike merit: just as Cæsar relates of their ancestors in his time, that whenever they went to war, by way either of attack or defence, they *elected* leaders to command them.[d] This large share of power, thus conferred by the people, though intended to preserve the liberty of the subject, was perhaps unreasonably detrimental to the prerogative of the crown: and accordingly we find a very ill use [410] made of it by Edric duke of Mercia, in the reign of king Edmund Ironside; who, by his office of duke or heretoch, was entitled to a large command in the king's army, and by his repeated treacheries at last transferred the crown to Canute the Dane.

Alfred first settled a militia.

It seems universally agreed by all historians, that king Alfred first settled a national militia in this kingdom, and by his prudent discipline made all the subjects of his dominion soldiers; but we are unfortunately left in the dark as to the particulars of this his so celebrated regulation; though, from what was last observed, the dukes seem to have been left in possesion of too large and independent a power; which enabled duke Harold on the death of Edward the confessor, though a stranger to the royal blood, to mount for a short space the throne of this kingdom, in prejudice of Edgar Atheling the rightful heir.

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[b] "*Isti vero viri eliguntur per com-* "*mune consilium, pro communi utili-* "*tate regni, per provincias et patrias* "*universas, et per singulos comitatus,* "*in pleno folkmote, sicut et vicecomites* "*provinciarum et comitatuum eligi de-* "*bent.*" *LL. Edw. Confess. ibid.* See also Bede, *Eccl. Hist. l* 5, *c.* 10.

[c] *De morib. Germ.* 7.

[d] "*Quum bellum civitas aut illa-* "*tum defendit aut infert, magistratus* "*qui ei bello præsint deliguntur.*" *De Bell. Gall. l.* 6, *c.* 22

On the Norman conquest the feudal law was introduced.

Upon the Norman conquest the feudal law was introduced here in all its rigour, the whole of which is built on a military plan. I shall not now enter into the particulars of that constitution, but shall only observe, that, in consequence thereof, all the lands in the kingdom were divided into what were called knights' fees, in number above sixty thousand; and for every knight's fee a knight or soldier, *miles*, was bound to attend the king in his wars, for forty days in a year; in which space of time, before war was reduced to a science, the campaign was generally finished, and a kingdom either conquered or victorious.[e] By this means the king had, without any expense, an army of sixty thousand men always ready at his command. And accordingly we find one, among the laws of William the conqueror,[f] which in the king's name commands and firmly enjoins the personal attendance of all knights and others; "*quod habeant et teneant se semper in armis et equis, ut decet et oportet:* [411] "*et quod semper sint prompti et parati ad servitium suum* "*integrum nobis explendum et peragendum cum opus adfuerit, secundum quod debent de feodis et tenementis suis de* "*jure nobis facere.*" This personal service in process of time degenerated into pecuniary commutations or aids, and at last the military part of the feudal system was abolished at the Restoration, by statute 12 Car. II. c. 24.

Mode of defence then adopted besides the feudal aid.

In the mean time we are not to imagine that the kingdom was left wholly without defence in case of domestic insurrections, or the prospect of foreign invasions. Besides those who by their military tenures were bound to perform forty days' service in the field, first the assize of arms, enacted 27 Hen. II.[g] and afterwards the statute of Winchester,[h] under Edward I., obliged every man, according to his estate and degree, to provide a determinate quantity of such arms as were then in use, in order to keep the peace: and constables were appointed in all hundreds by the latter statute to see that such arms were provided. These weapons were changed, by the statute 4 & 5 Ph. & M. c. 2, into others of more modern service: but both this and the former provisions were repealed in the reign of James I.[i] While these continued in force, it was usual from time to time for our princes to issue commissions of array, and send into every county officers in whom they could confide, to muster and array (or set in military order) the inhabitants of every district; and the form of the commission of array was settled in parliament in the 5 Hen. IV., so as to prevent the insertion therein of any new penal clauses.[j] But it was also provided[k] that no man should be compelled to go out of the kingdom at any rate, nor out of his shire but in cases of urgent necessity; nor should private soldiers unless by consent of [412] parliament. About the reign of king Henry the eighth, or his children, lieutenants began to be introduced,[l] as standing representatives of the crown, to keep the counties in military order; for we find them mentioned as known officers in the statute 4 & 5 Ph. & M. c. 3, though they had not been then long in use, for Camden speaks of them[m] in the time of queen Elizabeth, as extraordinary magistrates constituted only in times of difficulty and danger. But the introduction of these commissions of lieutenancy, which contained in substance the same powers as the old commissions of array, caused the latter to fall into disuse.

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[e] "The Poles are," says Blackstone, "even at this day, so tenacious "of their ancient constitution, that "their pospolite, or militia, cannot "be compelled to serve above six "weeks, or forty days, in a year." Mod. Un. Hist. xxxiv. 12; but Poland, unfortunately, no longer exists as an independent state.

[f] C. 58. See Co. Litt. 75, 76.

In the reign of Hen. VIII. lieutenants were appointed.

Question raised in the time of Charles I. as to how far the power of the

In this state things continued, till the repeal of the statutes of armour in the reign of king James the first: after which, when king Charles the first had, during his northern expeditions, issued commissions of lieutenancy and exerted militia resided in the king.

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[g] Hoved. *A. D.* 1181.

[h] 13 Edw. I. c. 6.

[i] Stat. 1 Jac. I. c. 25. 21 Jac. I. c. 28.

[j] Rushworth, part 3, page 662, 667. See 8 Rym. 374, &c.

[k] Stat. 1 Edw. III. st. 2, c. 5 & 7. 25 Edw. III. st. 5, c. 8.

[l] 15 Rym. 75.

[m] *Brit.* 103. Edit. 1594.

some military powers, which, having been long exercised, were thought to belong to the crown, it became a question in the long parliament, how far the power of the militia did inherently reside in the king; being now unsupported by any statute, and founded only upon immemorial usage. This question, long agitated, with great heat and resentment on both sides, became at length the immediate cause of the fatal rupture between the king and his parliament; the two houses not only denying this prerogative of the crown, the legality of which perhaps might be somewhat doubtful; but also seizing into their own hands the entire power of the militia, the illegality of which step could never be any doubt at all.

On the Restoration the right of the crown as to the militia was recognized and ascertained.

How the militia is now regulated

Soon after the Restoration of king Charles the second, when the military tenures were abolished, it was thought proper to ascertain the power of the militia, to recognize the sole right of the crown to govern and command them, and to put the whole into a more regular method of military subordination:[n] and the order, in which the militia now stands by law, is principally built upon the statutes which [413] were then enacted. It is true the two last of them are apparently repealed; but many of their provisions are re-enacted, with the addition of some new regulations, by the present militia laws: the general scheme of which is to discipline a certain number of the inhabitants of every county, chosen by lot formerly for *three*, but afterwards increased to *five*[o] years, and officered by the lord lieutenant, the deputy lieutenants, and other principal landholders, under a commission from the crown. They are not compellable to march out of their counties, unless in case of invasion or actual rebellion within the realm, (or any of its dominions or territories[p]) nor in any case compellable to march out of the kingdom. They are to be exercised at stated times: and their discipline in general is liberal and easy; but when drawn out into actual service, they are subject to the rigours of martial law, as necessary to keep them in order. This is the constitutional security, which our laws[q] have provided for the public peace, and for protecting the realm against foreign or domestic violence.

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[n] 13 Car. II. c. 6. 14 Car. II. c. 3. 15 Car. II. c. 4.

[o] 26 Geo. III. c. 107.

[p] Stat. 16 Geo. III. c. 3.

[q] 2 Geo. III. c. 20. 9 Geo. III. c. 42. 16 Geo. III. c. 3. 18 Geo. III. c. 14 & 59. 19 Geo. III. c. 72. 26 Geo. 3, c. 107.

and constituted. A great many statutes, says Mr. Justice Coleridge, for the ordering of the militia have been passed since the latest of those cited by the author, which are collected in Burn's Justice, under the title of Military Law. The general scheme however remains the same as described by Blackstone; the determining the quotas of each county is, in ordinary circumstances, left to the privy council to be fixed from ten years to ten years, with a power of increase reserved to the crown in case of invasion, or imminent danger thereof, or of rebellion; the officering the regiments is entrusted to the lord lieutenant, but the officers must have certain qualifications of property according to their ranks; the actual enrolment and organization of the regiments is placed in the hands of the deputy lieutenants. The mode of filling the ranks is by ballot, to which all persons who do not fall within the exemptions of the statute are equally liable, and must serve for five years if drawn, unless they produce a substitute, approved of by the deputy lieutenants. In case of actual invasion, or imminent danger thereof, and in all cases of rebellion and insurrection, his majesty has power to call out the militia, and place them under military command; but in ordinary times, by the 55 Geo. III. c. 65, the period during which they may be placed on duty is limited to twenty-eight days in any one year, and the 57 Geo. III. c. 57, authorizes his majesty to suspend their being embodied at all during any year. While they are placed on general military duty, there is scarcely any distinction in their pay, government or liability, from those of the troops of the line, except that they are only sworn to serve in Great Britain and Ireland, and that their service in the latter country cannot exceed two successive years. While they are merely called out for annual trainings, they are subject to no punishment which affects life or limb. Besides the militia to which these regulations apply, there are military forces of other descriptions, but distinct also from the standing army. These are the supplementary militia, or that increase upon the numbers of the regular militia which we have seen the king is empowered to make

Supplementary militia.

in certain circumstances: the local militia, superior in number, but more limited in its service than the regular militia; the enrolment in both of these is by ballot and compulsory; the yeomanry, which is a mounted volunteer force, and the small remains of that large body of volunteer infantry, if any such now exist, which started into being upon the menace of invasion from France in the reign of George the third.[r]

Yeomanry Volunteers.

When the nation was engaged in war, more veteran troops and more regular discipline were esteemed to be necessary, than could be expected from a mere militia. And therefore at such times more rigorous methods were put in use for the raising of armies and the due regulation and discipline of the soldiery: which are to be looked upon only as temporary excrescences bred out of the distemper of the state, and not as any part of the permanent and perpetual laws of the kingdom. For martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is, as sir Matthew Hale observes,[s] in truth and reality no law, but something indulged rather than allowed as a law. The necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land. Wherefore, Thomas earl of Lancaster being condemned at Pontefract, 15 Edw. II. by martial law, his attainder was reversed 1 Edw. III. because it was done in time of peace.[t] And it is laid down,[u] that if a lieutenant, or other, that hath commission of martial authority, doth in time of peace hang or otherwise execute any man by colour of martial law, this is murder; for it is against *magna carta*.[v] The petition of right[w] moreover enacts, that no commission shall issue to proceed within this land according to martial law. And also, that no soldier should be quartered on the subject without his own consent. But by the annual mutiny

When the nation is at war how the army is raised.

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Martial law how far it is to be endured.

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[r] See an act for the defraying the charges of disembodied militia, 1 & 2 Vict. c. 91, and for suspending for one year, the making the lists and ballots for the militia, cap. 90.

[s] Hist. C. L. c. 2.

[t] 2 Brad. Append. 59.

[u] 3 Inst. 52.

[v] *Cap.* 29.

[w] 3 Car. I. See also stat. 31 Car. II. c. 1.

act this last provision is altered, and it is enacted that the constable may billet officers and soldiers in inns and victualling houses, and the allowances both to the soldier and innkeeper are regulated by this act.[x] And whereas, after the Restoration, king Charles the second kept up about five thousand regular troops, by his own authority, for guards and garrisons; which king James the second by degrees increased to no less than thirty thousand, all paid from his own civil list; it was made one of the articles of the bill of rights,[y] that the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law.

A standing army is against law.

How far this rule is modified.

But, as the fashion of keeping standing armies (which was first introduced by Charles VII. in France, *A. D.* 1445[z]) has of late years universally prevailed over Europe, (though some of its potentates, being unable themselves to maintain them, are obliged to have recourse to richer powers, and receive subsidiary pensions for that purpose) it has also for many years past been annually judged necessary by our legislature, for the safety of the kingdom, the defence of the possessions of the crown of Great Britain, and the preservation of the balance of power in Europe, to maintain [415] even in time of peace a standing body of troops, under the command of the crown; who are however *ipso facto* disbanded at the expiration of every year, unless continued by parliament. And it was enacted by statute 10 Wm. III. c. 1, that not more than twelve thousand regular forces should be kept on foot in Ireland, though paid at the charge of that kingdom; which permission was extended by statute 8 Geo. III. c. 13, to 16,235 men, in time of peace, and since which time the force required has gradually increased, and the total for England and Ireland, authorized by the 1 Vict. c. 17, is 89,305.

The number regulated.

How the army is composed.

To prevent the executive power from being able to oppress, says baron Montesquieu,[a] it is requisite that the armies with which it is entrusted should consist of the people, and have the same spirit with the people; as was the case at

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[x] The clauses in the last act, 1 Vict. c. 17, are the 51—55.

[y] Stat. 1 W. & M. st. 2, c. 2.

[z] Robertson, Cha. V. i. 94.

[a] Sp. L. 11. 6.

Rome, till Marius new-modelled the legions by enlisting the rabble of Italy, and laid the foundation of all the military tyranny that ensued. Nothing then, according to these principles, ought to be more guarded against in a free state, than making the military power, when such a one is necessary to be kept on foot, a body too distinct from the people. Like ours, it should wholly be composed of natural subjects; it ought only to be enlisted for a short and limited time; the soldiers also should live intermixed with the people; no separate camp, no barracks, no inland fortresses should be allowed. And perhaps it might be still better, if, by dismissing a stated number and enlisting others at every renewal of their term, a circulation could be kept up between the army and the people, and the citizen and the soldier be more intimately connected together.

Annual mutiny act.

To keep this body of troops in order, an annual act of parliament likewise passes, "to punish mutiny and desertion, "and for the better payment of the army and their quarters." This regulates the manner in which they are to be dispersed among the several inn-keepers and victuallers throughout the kingdom: and establishes a law martial for their government. By this, among other things, it is enacted, that if [416] any officer or soldier shall begin, excite, cause, or join in any mutiny or sedition, or shall not use his utmost endeavours to suppress the same, or coming to the knowledge of any mutiny or intended mutiny shall not, without delay, give information thereof to his commanding officer; or shall misbehave himself before the enemy; or shall shamefully abandon or deliver up any garrison, fortress, post, or guard committed to his charge, or which he shall be commanded to defend; or shall compel the governor or commanding officer of any garrison, fortress, or post to deliver up to the enemy or to abandon the same; or shall speak words or use any other means to induce such governor or commanding officer, or others, to misbehave before the enemy, or shamefully to abandon or deliver up any garrison, fortress, post, or guard committed to their respective charge, or which he or they shall be commanded to defend; or shall leave his post before relieved, or shall be found sleeping on his post; or shall hold correspondence with or give advice or intelligence to any rebel or enemy of her majesty, either by letters, messages, signs, or tokens, in any manner or way whatsoever; or shall treat or enter into any terms with such rebel or enemy without her majesty's license or license of the general or chief commander; or shall strike or shall use or offer any violence against his superior officer, being in the execution of his office, or shall disobey any lawful command of his superior officer; or shall desert her majesty's service; such offender shall suffer such punishment as a court martial shall inflict, though it extend to death itself.

Punishment for desertion.

However expedient the most strict regulations may be in time of actual war, yet, in times of profound peace, a little relaxation of military rigour would not, one should hope, be productive of much inconvenience. And, upon this principle, though by our standing laws[b] (still remaining in force, though not attended to) desertion in time of war is made felony, without benefit of clergy, and the offence is triable by a jury and before justices at the common law; yet, by our militia laws before-mentioned, a much lighter punishment is inflicted for desertion in time of peace. So, by the Roman law also, desertion in time of war was punished with death, but more mildly in time of tranquillity.[c] But our mutiny act makes no such distinction: for any of the faults above-mentioned are, equally at all times, punishable with death itself, if a court martial shall think proper. This discretionary power of the court martial is indeed to be guided by the directions of the crown; which, with regard to military offences, has almost an absolute legislative power.[d] "His majesty," says the act, "may form articles of war, and "constitute courts martial, with power to try any crime by "such articles, and inflict penalties by sentence or judgment "of the same." A vast and most important trust! an unlimited power to create crimes, and annex to them any punishments, not extending to life or limb! These are indeed forbidden to be inflicted, except for crimes declared to [417] be so punishable by this act; which crimes we have just enumerated, and, among which, we may observe that any disobedience to lawful commands is one. Perhaps in some future revision of this act, which is in many respects hastily penned, it may be thought worthy the wisdom of parliament to ascertain the limits of military subjection, and to enact express articles of war for the government of the army, as is done for the government of the navy: especially as, by our present constitution, the nobility and gentry of the kingdom, who serve their country as militia officers, are annually subjected to the same arbitrary rule, during their time of exercise.

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[b] Stat. 18 Hen. VI. c. 19. 2 & 3 Edw. VI. c. 2.

[c] *Ff.* 49, 16, 5.

[d] A like power over the marines is given to the lords of the admiralty, by another annual act "for the regulation of his majesty's marine forces "while on shore."

Disadvantages of martial law.

One of the greatest advantages of our English law is, that not only the crimes themselves which it punishes, but also the penalties which it inflicts, are ascertained and notorious: nothing is left to arbitrary discretion: the king by his judges dispenses what the law has previously ordained; but is not himself the legislator. How much therefore is it to be regretted that a set of men, whose bravery has so often preserved the liberties of their country, should be reduced to a state of servitude in the midst of a nation of freemen! for sir Edward Coke will inform us,[e] that it is one of the genuine marks of servitude, to have the law, which is our rule of action, either concealed or precarious: "*misera est servitus* "*ubi jus est vagum aut incognitum.*" Nor is this state of servitude quite consistent with the maxims of sound policy observed by other free nations. For, the greater the general liberty is which any state enjoys, the more cautious has it usually been in introducing slavery in any particular order or profession. These men, as baron Montesquieu observes,[f] seeing the liberty which others possess and which they themselves are excluded from, are apt (like eunuchs in the eastern seraglios) to live in a state of perpetual envy and hatred towards the rest of the community; and indulge a malignant pleasure in contributing to destroy those priveleges, to which they can never be admitted. Hence have many free states, by departing from this rule, been endangered by the revolt [418] of their slaves: while, in absolute and despotic governments where no real liberty exists, and consequently no invidious comparisons can be formed, such incidents are extremely rare. Two precautions are therefore advised to be observed in all prudent and free governments: 1. To prevent the introduction of slavery at all: or, 2. If it be already introduced, not to intrust those slaves with arms; who will then find themselves an overmatch for the freemen. Much less ought the soldiery to be an exception to the people in general, and the only state of servitude in the nation.

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[e] 4 Inst. 332.

[f] Sp. L. 15, 12.

Advantages of the military service.

But as soldiers, by this annual act, are thus put in a worse condition than any other subjects, so by the humanity of our standing laws, they are in some cases put in a much better. By statute 43 Eliz. c. 3, a weekly allowance is to be raised in every county for the relief of soldiers that are sick, hurt, and maimed: although this has not been of late years collected:[g] not forgetting the royal hospital at Chelsea for such as are worn out in their duty. Officers and soldiers, that have been in the king's service, are by several statutes, enacted at the close of several wars, at liberty to use any trade or occupation they are fit for, in any town in the kingdom (except the two universities) notwithstanding any statute, custom, or charter to the contrary. And soldiers in actual military service may, as well before as since the recent statutes, make nuncupative wills, and dispose of their goods, wages and other personal chattels, without those forms, solemnities, and expenses, which the law requires in other cases.[h] Our law does not indeed extend this privilege so far as the civil law; which carried it to an extreme that borders upon the ridiculous. For if a soldier, in the article of death, wrote any thing in bloody letters on his shield, or in the dust of the field with his sword, it was a very good military testament.[i] And thus much for the military state, as acknowledged by the laws of England.

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The maritime state.

The *maritime* state is nearly related to the former: though much more agreeable to the principles of our free constitution. The royal navy of England hath ever been its greatest defence and ornament; it is its ancient and natural strength:

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[g] Mr. J. Coleridge's note.

[h] Stat. 29 Car. II. c. 3. 5 Wm. III. c. 21, §. 6. 1 Vict. c. 26, s. 11.

[i] *Si milites quid in clypeo literis sanguine sue rutilantibus adnotaverint, aut in pulvere inscripserint gladio suo, ipso tempore quo, in prælio, vitæ sortem derelinquunt, hujusmodi voluntatem stabilem esse oportet. Cod.* 6, 21, 15. See also *post*, p. 255.

the floating bulwark of the island; an army, from which, however strong and powerful, no danger can ever be apprehended to liberty: and accordingly it has been assiduously cultivated, even from the earliest ages. To so much perfection was our naval reputation arrived in the twelfth century, that the code of maritime laws, which are called the laws of Oleron, and are received by all nations in Europe as the ground and substruction of all their marine constitutions, was confessedly compiled by our king Richard the first, at the isle of Oleron on the coast of France, then part of the possessions of the crown of England.[j] And yet, so vastly inferior were our ancestors in this point to the present age, that even in the maritime reign of queen Elizabeth sir Edward Coke[k] thinks it matter of boast, that the royal navy of England then consisted of *three and thirty* ships. The present condition of our marine is in great measure owing to the salutary provisions of the statutes, called the navigation acts; whereby the constant increase of English shipping and seamen was not only encouraged, but rendered unavoidably necessary. By the statute 5 Ric. II. c. 3, in order to augment the navy of England, then greatly diminished, it was ordained, that none of the king's liege people should ship any merchandize out of or into the realm but only in ships of the king's ligeance, on pain of forfeiture. In the next year, by statute 6 Ric. II. c. 8, this wise provision was enervated, by only obliging the merchants to give English ships (if able and sufficient) the preference. But the most beneficial statute for the trade and commerce of these kingdoms, at the time perhaps in which it was made, was that navigation act, the rudiments of which were first framed in 1650,[l] with a narrow partial view: being intended to mortify our own sugar islands, which were disaffected to the parliament and still held out for Charles II., by stopping the gainful trade which they then carried on with the Dutch;[m] and at the same time [420] to clip the wings of those our opulent and aspiring neighbours. This prohibited all ships of foreign nations from trading with any English plantations without license from the council of state. In 1651[n] the prohibition was extended also to the mother country: and no goods were suffered to be imported into England, or any of its dependencies, in any other than English bottoms; or in the ships of that European nation, of which the merchandize imported was the genuine growth or manufacture. At the Restoration, the former provisions were continued, by statute 12 Car. II. c. 18, with this very material alteration, that the master and three-fourths of the mariners should also be English subjects. And these acts were farther enforced and rendered more effectual by statutes 26 Geo. III. c. 60, and 27 Geo. III. c. 19, and other statutes. But in 1825, these and all other acts on the subject were repealed, as it was very generally admitted that the old regulations on the subject were, at any rate, inapplicable to the exigencies of the present time. By the act then passed, 6 Geo. IV. c. 109, the coasting trade is entirely confined to British ships, but foreign shipping is in some instances admitted to the import trade upon certain conditions. The masters and seamen of our vessels must be natural-born subjects, naturalized or denizens, or such as have become subjects by conquest or cession, or persons who have served on board a man of war, belonging to the king, in war time, for three years, but by virtue of a royal proclamation, this period of service may be lessened to two years: and by the same authority the proportion of seamen may be altered. But both in English and foreign ships one proper seaman to twenty tons is declared sufficient, though the number of the other mariners may exceed one-fourth of the whole crew. All British ships must be registered according to the provisions of the 6 Geo. IV. c. 110.

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[j] 4 Inst. 144. *Coutumes de la mer.* 2.

[k] 4 Inst. 50.

[l] Scobell, 132.

[m] Mod. Un. Hist. xli. 289.

Regulations as to the royal navy. Many laws have been made for the supply of the royal navy with seamen; for their regulation when on board; and to confer privileges and rewards on them during and after their service.

1. For the supply of seamen. 1. First, for their supply. The power of impressing sea-faring men for the sea service by the king's commission has been a matter of some dispute, and submitted to with great reluctance; though it hath very clearly and learnedly been shewn, by sir Michael Foster,[o] that the practice of im-

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[n] Scobell, 176.

[o] Rep. 154.

Impressment of seamen.

pressing, and granting powers to the admiralty for that purpose, is of very ancient date, and hath been uniformly continued by a regular series of precedents to the present time: whence he concludes it to be part of the common law, and this has been so held repeatedly.[p] The difficulty arises from hence, that no statute has expressly declared this power to be in the crown, though many of them very strongly imply it. The statute 2 Ric. II. c. 4, speaks of mariners being arrested and retained for the king's service, as of a thing well known and practised without dispute; and provides a remedy against their running away. By a later statute,[q] if any waterman, [419*] who uses the river Thames, shall hide himself during the execution of any commission of pressing for the king's service, he is liable to heavy penalties. By another,[r] no fisherman shall be taken by the queen's commission to serve as a mariner; but the commission shall be first brought to two justices of the peace, inhabiting near the sea coast where the mariners are to be taken, to the intent that the justices may choose out and return such a number of able-bodied men, as in the commission are contained, to serve her majesty. And, by others,[s] especial protections are allowed to seamen in particular circumstances, to prevent them from being impressed. And ferrymen are also said to be privileged from being impressed, at common law.[t] All which do most evidently imply a power of impressing to reside somewhere; and, if any where, it must from the spirit of our constitution, as well as from the frequent mention of the king's commission, reside in the crown alone. It has been recently enacted,[u] that no person shall be liable to be detained, against his consent, in the royal navy for a longer period than three years, but the statute authorizes the commanding officer of the squadron to detain such person in cases of exigency, for a further period of six months, or until such emergency shall have ceased.

But, besides this method of impressing, (which is only

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[p] See also Comb. 245. Barr. 334. See also *Rex* v. *Tubb*, Cowp. 510.

[q] Stat. 2 & 3 Ph. & M. c. 16.

[r] Stat. 5 Eliz. c. 5.

[s] See Stat. 7 & 8 Wm. III. c. 21. 2 Ann. c. 6. 4 & 5 Ann. c. 19. 13 Geo. II. c. 17. 2 Geo. III. c. 15. 11 Geo. III. c. 38. 19 Geo. III. c. 75, &c.

[t] Sav. 14.

[u] 5 & 6 Wm. IV. c. 24.

Other ways of manning the navy. defensible from public necessity, to which all private considerations must give way) there are other ways that tend to the increase of seamen, and manning the royal navy. Parishes may bind out poor boys apprentices to masters of merchantmen, who shall be protected from impressing for the first three years; and if they are impressed afterwards, the masters shall be allowed their wages;[v] great advantages in point of wages are given to volunteer seamen in order to induce them to enter into his majesty's service;[w] and every foreign seaman, who during a war shall serve two years in any man of war, merchantman, or privateer, is naturalized *ipso facto*.[x] About the middle of king William's reign, a scheme was set on foot[y] for a register of seamen to the [420*] number of thirty thousand, for a constant and regular supply of the king's fleet; with great privileges to the registered men, and, on the other hand, heavy penalties in case of their non-appearance when called for: but this registry, being judged to be ineffectual as well as oppressive, was abolished by statute 9 Ann. c. 21; but has been recently partially re-established.[z]

2. The articles for the ordering the navy. 2. The method of ordering seamen in the royal fleet, and keeping up a regular discipline there, is directed by certain express rules, articles, and orders, first enacted by the authority of parliament soon after the Restoration;[a] but since new modelled and altered, after the peace of Aix la Chapelle,[b] to remedy some defects which were of fatal consequence in conducting the preceding war. In these articles of the navy almost every possible offence is set down, and the punishment thereof annexed: in which respect the seamen have much the advantage over their brethren in the land service: whose articles of war are not enacted by parliament, but framed from time to time at the pleasure of the crown. Yet from whence this distinction arose, and why the executive power, which is limited so properly with regard to the navy, should be so extensive with regard to the army, it is hard to assign a reason: unless it proceeded from the perpetual establishment of the navy, which rendered a permanent law for their regulation expedient; and the temporary duration of the army, which subsisted only from year to year, and might therefore with less danger be subjected to discretionary government. But, whatever was apprehended at the first formation of the mutiny act, the regular renewal of our standing force at the entrance of every year has made this distinction idle. For, if from experience past we may judge of future events, the army is now lastingly ingrafted into the British constitution; with this singularly fortunate circumstance, that any branch of the legislature may annually put an end to its legal existence, by refusing to concur in its continuance.

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[v] Stat. 2 Ann. c. 6. 5 & 6 Wm. IV. c. 19.

[w] Stat. 31 Geo. II. c. 10.

[x] Stat. 13 Geo. II. c. 3. See *ante* p. 399.

[y] Stat. 7 & 8 Wm. III. c. 21.

[z] 5 & 6 Wm. IV. c. 19.

[a] Stat. 13 Car. II. st. 1, c. 9.

[b] Stat. 22 Geo. II. c. 23, amended by 19 Geo. III. c. 17.

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3. The privileges conferred on the navy.

3. With regard to the privileges conferred on sailors, they are pretty much the same with those conferred on soldiers; with regard to relief when maimed, or wounded, or superannuated, either by county rates, or the royal hospital at Greenwich; with regard also to the exercise of trades, and the power of making nuncupative testaments: and farther,[c] no seaman aboard his majesty's ships could at any time be arrested for any debt, unless the same were sworn to amount to at least twenty pounds; and, by the annual mutiny acts, a soldier could not be arrested for any debt under thirty pounds.[d] But now all arrest for debt on mesne process is abolished,[e] which provision extends equally to all classes of her majesty's subjects.

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[c] Stat. 31 Geo. II. c. 10.

[d] 1 Vict. c. 17, s. 3.

[e] 1 & 2 Vict. c. 110.

CHAPTER THE FOURTEENTH.

OF MASTER AND SERVANT.

[422] HAVING thus commented on the rights and duties of persons, as standing in the *public* relations of magistrates and people, the method I have marked out now leads me to consider their rights and duties in *private* economical relations.

The private relations of life.

1. Master and servant.

The three great relations in private life are, 1. That of *master and servant*; which is founded in convenience, whereby a man is directed to call in the assistance of others, where his own skill and labour will not be sufficient to answer the cares incumbent upon him. 2. That of *husband and wife*; which is founded in nature, but modified by civil society; the one directing man to continue and multiply his species, the other prescribing the manner in which that natural impulse must be confined and regulated. 3. That of *parent and child*, which is consequential to that of marriage, being its principal end and design: and it is by virtue of this relation that infants are protected, maintained and educated. But, since the parents on whom this care is primarily incumbent, may be snatched away by death before they have completed their duty, the law has therefore provided a fourth relation; 4. That of *guardian and ward*, which is a kind of artificial parentage, in order to supply the deficiency, whenever it happens, of the natural. Of all these relations in their order.

2. Husband and wife.

3. Parent and child.

4. Guardian and ward.

[423] In discussing the relation of *master* and *servant*, I shall, first, consider the several sorts of servants, and how this relation is created and destroyed: secondly, the effect of this

relation with regard to the parties themselves: and, lastly, its effect with regard to other persons.

I. As to the several sorts of servants.

1. As to the several sorts of servants: I have formerly observed[a] that pure and proper slavery does not, nay cannot, subsist in England: such I mean whereby an absolute and unlimited power is given to the master over the life and fortune of the slave. And indeed it is repugnant to reason, and the principles of natural law, that such a state should subsist any where. The three origins of the right of slavery, assigned by Justinian,[b] are all of them built upon false foundations.[c] As, first, slavery is held to arise "*jure gentium*," from a state of captivity in war; whence slaves are called "*mancipia, quasi manu capti.*" The conqueror, says the civilian, had a right to the life of his captive; and having spared that, has a right to deal with him as he pleases. But it is an untrue position, when taken generally, that by the law of nature or nations, a man may kill his enemy: he has only a right to kill him in particular cases; in cases of absolute necessity for self-defence; and it is plain this absolute necessity did not subsist, since the victor did not actually kill him, but made him prisoner. War is itself justifiable only on principles of self-preservation: and therefore it gives no other right over prisoners but merely to disable them from doing harm to us, by confining their persons: much less can it give a right to kill, torture, abuse, plunder, or even to enslave, an enemy, when the war is over. Since therefore the right of *making* slaves by captivity depends on a supposed right of slaughter, that foundation failing, the consequence drawn from it must fail likewise. But, secondly, it is said that slavery may begin "*jure civili;*" when one man sells himself to another. This, if only meant of contracts to serve or work for another, is very just: but [424] when applied to strict slavery, in the sense of the laws of old Rome or modern Barbary, is also impossible. Every sale implies a price, a *quid pro quo*, an equivalent given to the seller in lieu of what he transfers to the buyer: but what equivalent can be given for life, and liberty, both of which (in absolute slavery) are held to be in the master's disposal?

No slavery in England.

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[a] Page 121.

[b] *Servi aut siunt, aut nascunter: siunt jure gentium, aut jure civilii: nascuntur ex ancillis nostris.* *Inst.* 1, 3, 4.

[c] Montesq. Sp. L. xv. 2.

His property also, the very price he seems to receive, devolves *ipso facto* to his master, the instant he becomes his slave. In this case therefore the buyer gives nothing, and the seller receives nothing: of what validity then can a sale be, which destroys the very principles upon which all sales are founded? Lastly, we are told, that besides these two ways by which slaves "*fiunt*," or are acquired, they may also be hereditary: "*servi nascuntur;*" the children of acquired slaves are "*jure naturæ;*" by a negative kind of birthright, slaves also. But this, being built on the two former rights, must fall together with them. If neither captivity, nor the sale of one's self, can by the law of nature and reason reduce the parent to slavery, much less can they reduce the offspring.

As it is not endured by the English law. Upon these principles the law of England abhors, and will not endure the existence of, slavery within this nation: so that when an attempt was made to introduce it, by statute 1 Edw. VI. c. 3, which ordained, that all idle vagabonds should be made slaves, and fed upon bread and water, or small drink, and refuse meat; should wear a ring of iron round their necks, arms, or legs; and should be compelled by beating, chaining, or otherwise, to perform the work assigned them, were it never so vile; the spirit of the nation could not brook this condition, even in the most abandoned rogues; and therefore this statute was repealed in two years afterwards.[d] And now it is laid down,[e] that a slave or negro, the instant he lands in England becomes a freeman; that is, the law will protect him in the enjoyment of his person, and his property. "Yet, with regard to any right which the "master may have lawfully acquired to the perpetual service "of John or Thomas, this will remain," according to Blackstone, "exactly in the same state as before: for this is, in [425] "his opinion, no more than the same state of subjection for "life, which every apprentice submits to for the space of "seven years, or sometimes for a longer term. Hence, too "it followed that the infamous and unchristian practice of "withholding baptism from negro servants, lest they should "thereby gain their liberty, was totally without foundation,

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[d] Stat. 3 & 4 Edw. VI. c. 16.

[e] Salk. 666. Sommerset's case. 20 St. Tr. 79, and Lofft. 1. See also Grace's case, reported by Dr. Haggard.

"as well as without excuse. The law of England acts "upon general and extensive principles: it gives liberty, "rightly understood, that is, protection to a Jew, a Turk, "or a heathen, as well as to those who profess the "true religion of Christ; and it will not dissolve a "civil obligation between master and servant, on account of the alteration of faith in either of the parties: "but the slave is entitled to the same protection in England "before, as after, baptism; and, whatever service the heathen negro owed of right to his American master, by "general not by local law, the same (whatever it be) is he "bound to render when brought to England and made a "Christian." But this opinion always open to some doubt, is very questionable, since the act for abolishing slavery in the West Indies, to which we have already alluded.[f]

1. Menial servants.

1. The first sort of servants therefore, acknowledged by the laws of England, are *menial servants;* so called from being *intra mœnia,* or domestics. The contract between them and their masters arises upon the hiring. If the hiring be general, without any particular time limited, the law, if there be no custom to the contrary, construes it to be a hiring for a year:[g] upon a principle of natural equity, that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons; as well when there is work to be done, as when there is not:[h] but the contract may be made for any larger or smaller term: and in London, and many other places, a domestic servant is only usually entitled to a month's warning, or a month's wages,[i] and if a servant positively refuses to obey his master's orders, he will be warranted in turning him away.[j] All single men between twelve years old and sixty, and married ones under thirty years of age, and all single women between twelve and forty, not having any visible livelihood, are compellable by two justices to go out to service in husbandry or certain specific trades, for the promotion of honest industry: and no master can put away his servant,

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[f] See *ante*, p. 121.

[g] Co. Litt. 42.

[h] F N. B. 168.

[i] *Robinson* v. *Hindman*, 3 Esp. 235. *Beeston* v. *Collyer*, 4 Bing. 389. 2 C. & P. 607.

[j] *Spain* v. *Arnott*, 2 Stark. 256.

or servant leave his master, after being so retained, either before or at the end of his term, without a quarter's warning [426] (except in London, &c.); unless upon reasonable cause, to be allowed by a justice of the peace:[k] but they may part by consent, or make a special bargain. However the jurisdiction of the justice only extends to servants in husbandry, and the trades mentioned in the different statutes.[l]

2. Apprentices.

2. Another species of servants are called *apprentices* (from *apprendre*, to learn) and are usually bound for a term of years, by deed indented or indentures, to serve their masters, and be maintained and instructed by them. This is usually done to persons of trade, in order to learn their art and mystery; and sometimes very large sums are given with them, as a premium for such their instruction: but it may be done to husbandmen, nay to gentlemen, and others. And[m] children of poor persons may be apprenticed out by the overseers, with consent of two justices, till twenty-one years of age, to such persons as are thought fitting; who are also compellable to take them; and it is held, that gentlemen of fortune, and clergymen, are equally liable with others to such compulsion:[n] for which purposes our statutes have made the indentures obligatory, even though such parish-apprentice be a minor;[o] and by the new poor law act,[p] the commissioners are authorized to make rules for the administration of the laws for apprentices, the children of poor persons. Apprentices to trades may be discharged on reasonable cause, either at the request of themselves or masters, at the quarter-sessions, or by one justice, with appeal to the sesions;[q] who may, by the equity of the statute, if they think it reasonable, direct restitution of a rateable share of the money

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[k] Stat. 5 Eliz. c. 4, abolished by the 53 Geo. III. c. 40, and 54 Geo. III. c. 96.

[l] *Rex* v. *Hubcott*, 6 T. R. 583. 20 Geo. 2, c. 19. 4 Geo. IV. c. 34.

[m] Stat. 5 Eliz. c. 4. 43 Eliz. c. 2, 1 Jac. I. c. 25. 7 Jac. I. c. 3. 8 & 9 W. & M. c. 30. 2 & 3 Ann. c. 6. 4 Ann. c. 19. 17 Geo. II. c. 5. 18 Geo. III. c. 47. 32 Geo. III. c. 57. 33 Geo. III. c. 55. 42 Geo. III. c. 46. 42 Geo. III. c. 73. 51 Geo. III. c. 80. 54 Geo. III. c. 107. 56 Geo. III. c. 139, 1 & 2 Geo. IV. c. 42. 4 Geo. IV. c. 34, and others collected in Burn's Justice.

[n] Salk. 57. 491.

[o] Stat. 5 Eliz. c. 4. 43 Eliz. c. 2. Cro. Car. 179.

[p] 4 & 5 Wm. IV. c. 76, ss. 15 and 71.

[q] Stat. 5 Eliz. c. 4.

given with the apprentice ;[r] and parish-apprentices may be discharged in the same manner, by two justices.[s] But if an apprentice, with whom less than ten pounds hath been given, runs away from his master, he is compellable to serve out his time of absence, or make satisfaction for the same, at any time within seven years after the expiration of his original contract.[t]

3. Labourers.

3. A third species of servants are *labourers*, who are only hired by the day or the week, and do not live *intra mœnia* as part of the family, concerning whom the statutes before cited[u] have made many very good regulations: 1. Directing that all persons who have no visible effects may be compelled to work: 2. Defining how long they must continue at work in summer and in winter: 3. Punishing such as leave or desert their work: 4. Inflicting penalties on such as either give, or exact, more wages than are so settled: and, formerly, empowered the justices of the peace at session, or the sheriff to settle their wages, but this power is taken away by the 53 Geo. III. c. 40.

4. Stewards, factors, and bailiffs.

4. There is yet a fourth species of servants, if they may be so called, being rather in a superior, or ministerial, capacity; such as *stewards, factors*, and *bailiffs:* whom however the law considers as servants *pro tempore*, with regard to such of their acts as affect their master's or employer's property. Which leads me to consider,

II. The effect of the relation.

II. The manner in which this relation of service, affects either the master or servant. And, first, by hiring and service for a year, according to the former law, a person gained a settlement in that parish wherein he last served forty days.[v] But settlement by hiring and service is now abolished,[w] but apprenticeship still gains a settlement, unless it be to the sea service.[x] In the next place persons, serving seven years as apprentices to any trade, had an exclusive right to exercise that trade in any part of England.[y] But this law, with regard to the exclusive part of it, has by turns been looked upon as a hard law, or as a beneficial one, according to the prevailing humour of the times: which occasioned a great variety of resolutions in the courts of law concerning it; and attempts were frequently made for its repeal, which have at last been successful. At common law every man might use what trade he pleased; but the statute of Elizabeth restrained that liberty to such as had served as apprentices: the adversaries to which provision said, that all restrictions (which tend to introduce monopolies) were pernicious to trade; the advocates for it alleged that unskilfulness in trades was equally detrimental to the public, as monopolies. This reason indeed only extended to such [428] trades, in the exercise whereof skill may be required: but another of their arguments went much farther; *viz.* that apprenticeships were useful to the commonwealth, by employing of youth, and learning them to be early industrious; but that no one would be induced to undergo a seven years servitude, if others, though equally skilful, were allowed the same advantages without having undergone the same discipline: and in this there seemed to be much reason. However, the resolutions of the courts in general rather confined than extended the restriction. No trades were held to be within the statute, but such as were in being at the making of it:[z] for trading in a country village, apprenticeships were not requisite:[a] and following the trade seven years without any effectual prosecution (either as a master or a servant) was sufficient without an actual apprenticeship.[b] And at last the penal part of the statute of Elizabeth was repealed by the 54 Geo. III. c. 96, and very recently by the Municipal Corporation Act,[c] all persons may use every lawful trade, occupation, mystery, or handicraft, for hire, gain, sale, or otherwise, within any borough, any custom or bye-law to the contrary notwithstanding.

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[r] Salk. 67.

[s] Stat. 20 Geo. II. c. 19.

[t] Stat. 6 Geo. III. c. 26.

[u] Stat 5 Eliz. c. 4. 6 Geo. III. c. 26.

[v] See page 364.

[w] 4 & 5 Wm. IV. c. 76, s. 66.

[x] *Ibid.* s. 67. See *ante*, p. 388.

[y] Stat. 5 Eliz. c. 4, §. 31.

In what instances a master may correct his servants.

A master may by law correct his apprentice for negligence or other misbehaviour, so it be done with moderation:[d] though, if the master or master's wife beats any other servant of full age, it is good cause of departure.[e] But if any servant, workman, or labourer assaults his master or dame, he shall suffer one year's imprisonment, and other open corporal punishment, not extending to life or limb.[f]

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[z] Lord Raym. 514.

[a] 1 Ventr. 51. 2 Keb. 583.

[b] Lord Raym. 1179. *Wallen qui tam* v. *Holton*, Tr. 33 Geo. II. (by all the judges.

[c] 5 & 6 Wm. IV. c. 76, s. 14.

[d] 1 Hawk. P.C. 130. Lamb. Eiren. 127. Cro. Car. 179. 2 Show. 289.

Servants are entitled to wages.

By service all servants and labourers, except apprentices, become entitled to wages: according to their agreement, if menial servants; or according to the appointment of the sheriff or sessions, if labourers or servants in husbandry: for the statutes for regulation of wages extend to such servants only;[g] it being impossible for any magistrate to be a judge of the employment of menial servants, or of course to assess their wages.

III. How strangers may be effected by this relation.

[429]

III. Let us, lastly, see how strangers may be affected by this relation of master and servant: or how a master may behave towards others on behalf of his servant; and what a servant may do on behalf of his master.

What action the master may maintain with respect to his servant.

And, first, the master may *maintain*, that is, abet and assist his servant in any action at law against a stranger: whereas, in general, it is an offence against public justice to encourage suits and animosities, by helping to bear the expense of them, and is called in law maintenance.[h] A master also may bring an action against any man for beating or maiming his servant: but in such case he must assign, as a special reason for so doing, his own damage by the loss of his service; and this loss must be proved upon the trial.[i] A master likewise may justify an assault in defence of his servant, and a servant in defence of his master:[j] the master, because he has an interest in his servant, not to be deprived of his service; the servant, because it is part of his duty, for which he receives his wages, to stand by and defend his master.[k] Also if any person do hire or retain my servant, being in my service, for which the servant departeth from me and goeth to serve the other, I may have an action for damages against both the new master and the servant, or either of them: but if the new master did not know that he is my servant, no action lies; unless he afterwards refuse to restore him upon information and demand.[l] The reason and foundation, upon which all this doctrine is built, seem to be the property that every man has in the service of his domestics; acquired by the contract of hiring, and purchased by giving them wages.

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[e] F. N. B. 168. Bro. *Abr. t. Labourers*, 51. *Trespass*, 349.

[f] Stat. 5 Eliz. c. 4.

[g] 2 Jones, 47. See *ante*, p. 460.

[h] 2 Roll. Abr. 115.

[i] 9 Rep. 113.

[j] 2 Roll. Abr. 546. *Tickell* v. *Read*, Lloffi, 215.

[k] In like manner, by the laws of king Alfred, c. 38, a servant was allowed to fight for his master, a parent for his child, and a husband or father for the chastity of his wife or daughter.

What things a servant may do on behalf of his master,

As for those things which a servant may do on behalf of his master, they seem all to proceed upon this principle, that the master is answerable for the act of his servant, if done by his command, either expressly given, or implied: *nam qui facit per alium, facit per se.*[m] Therefore, if the [430] servant commit a trespass by the command or encouragement of his master, the master shall be guilty of it: though the servant is not thereby excused, for he is only to obey his master in matters that are honest and lawful. If an innkeeper's servant rob his guests, the master is bound to restitution:[n] for as there is a confidence reposed in him, that he will take care to provide honest servants, his negligence is a kind of implied consent to the robbery; *nam, qui non prohibet, cum prohibere possit, jubet.*[o] So likewise if the drawer at a tavern sells a man bad wine, whereby his health is injured, he may bring an action against the master:[p] for although the master did not expressly order the servant to sell it to that person in particular, yet his permitting him to draw and sell it at all is impliedly a general command.

and where the master is responsible.

In the same manner, whatever a servant is permitted to do in the usual course of his business, is equivalent to a general command. If I pay money to a banker's servant, the banker is answerable for it: if I pay it to a clergyman's or a physician's servant, whose usual business it is not to receive money for his master, and he embezzles it, I must pay it over again. If a steward lets a lease of a farm, without the owner's knowledge, the owner must stand to the bargain; for this is the steward's business. A wife, a friend, a relation, that use to transact business for a man, are *quoad hoc* his servants; and the principal must answer for their conduct: for the law implies, that they act under a general command; and without such a doctrine as this no mutual intercourse between man and man could subsist with any tolerable convenience. If I usually deal with a tradesman by myself, or constantly pay him ready money, I am not answerable for what my servant takes up upon trust; for here is no implied order to the tradesman to trust my servant: but if I usually send him upon trust, or sometimes on trust and sometimes with ready money, I am answerable for all he takes up; for the tradesman cannot possibly distinguish when he comes by my order, and when upon his own authority.[q]

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[l] F. N. B. 167, 168.

[m] 4 Inst. 109.

[n] Noy's Max. c. 43.

[o] See *Burgess* v. *Clements*, M. & S. 311.

[p] 1 Roll. Abr. 95.

Where a master shall answer for the negligence of his servant.

If a servant, lastly, by his negligence does any damage to a stranger, the master shall answer for his neglect: if a smith's servant lames a horse while he is shoeing him, an action lies against the master, and not against the servant. But in these cases the damage must be done, while he is actually employed in the master's service; otherwise the servant shall answer for his own misbehaviour. Upon this principle, by the common law,[r] if a servant kept his master's fire negligently, so that his neighbour's house was burned down thereby, an action lay against the master; because this negligence happened in his service: otherwise, if the servant, going along the street with a torch, by negligence sets fire to a house; for there he is not in his master's immediate service: and must himself answer the damage personally. But now the common law is, in the former case, altered by the statute 14 Geo. III. c. 78, re-enacting the 6 Ann. c. 3, which ordains that no action shall be maintained against any, in whose house or chamber any fire shall accidentally begin; for their own loss is sufficient punishment for their own or their servant's carelessness. But if such fire happens through negligence of any servant (whose loss is commonly very little) such servant shall forfeit 100*l*., to be distributed among the sufferers; and, in default of payment, shall be committed to some workhouse and there kept to hard labour for eighteen months.[s] A master is, lastly, chargeable if any of his family layeth or casteth any thing out of his house into the street or common highway, to the damage of any individual, or the common nuisance of his majesty's liege people:[t] for the master hath the superintendence and charge of all his household. And this also agrees with the civil law;[u] which holds that the *pater familias*, in this and similar cases, "*ob alterius culpam* "*tenetur, sive servi, sive liberi.*"

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[q] Dr. & Stud. d. 2, c. 42. Noy's Max. c. 44.

[r] Noy's Max. c. 44.

[432] We may observe, that in all the cases here put, the master may be frequently a loser by the trust reposed in his servant, but never can be a gainer; he may frequently be answerable for his servant's misbehaviour, but never can shelter himself from punishment by laying the blame on his agent. The reason of this is still uniform and the same; that the wrong done by the servant is looked upon in law as the wrong of the master himself; and it is a standing maxim, that no man shall be allowed to make any advantage of his own wrong.

Before concluding this chapter, it is proper to add, that by statute 32 Geo. III. c. 56, if any person shall give a false character of a servant, or if a servant shall give a false account, he shall, upon conviction before a justice of the peace, forfeit 20*l.*, and 10*s.* costs.

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[s] Upon a similar principle, by the law of the twelve tables at Rome, a person by whose negligence any fire began was bound to pay double to the sufferers; or, if he was not able to pay, was to suffer a corporal punishment.

[t] Noy's Max. c. 44.

[u] *Ff.* 9, 3, 1. *Inst.* 4, 5, 1.

CHAPTER THE FIFTEENTH.

OF HUSBAND AND WIFE.

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[433] THE second private relation of persons is that of marriage, which includes the reciprocal right and duties of husband and wife: or, as most of our elder law books call them, of *baron* and *feme*. In the consideration of which I shall in the first place inquire, how marriages may be contracted or made; shall next point out the manner in which they may be dissolved; and shall, lastly, take a view of the legal effects and consequence of marriage.

Division of the chapter.

I. How a marriage may be contracted.

I. Our law considers marriage in no other light than as a civil contract, and until very recently, the *holiness* of the matrimonial state was left entirely to the matrimonial law: the temporal courts not having jurisdiction to consider unlawful marriage as a sin, but merely as a civil inconvenience. The punishment therefore, or annulling, of incestuous or other unscriptural marriages, was the province of the spiritual courts: which act *pro salute animæ*.[a] However, by the 5 & 6 Wm. IV. c. 54, it is enacted, that marriages between persons within the prohibited degrees of affinity, which had been celebrated before the passing of the act, (the 31st of August, 1835), should not be annulled for that cause, by any sentence of the ecclesiastical court, unless pronounced in a suit which should be depending at the time of the passing of the act, (s. 1); but that henceforward all such marriages shall be null and void. These are therefore now positively void, and I conceive their nullity would be recognized, as well in the temporal, as in the ecclesiastical courts. Taking marriage however in its civil light, the law treats it as it does all other contracts: allowing it to be good and valid in all cases, where the parties at the time of making it were, in the first place, *willing* to contract; secondly, *able* to contract; and, lastly, actually *did* contract, in the proper forms and solemnities required by law.

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[a] Salk. 121.

First, the parties must be willing to contract.

[434] First, they must be *willing* to contract. "*Consensus non* "*concubitus, faciat nuptias,*" is the maxim of the civil law in this case:[b] and it is adopted by the common lawyers,[c] who indeed have borrowed (especially in ancient times) almost all their notions of the legitimacy of marriage from the canon and civil laws.

Secondly, able to contract.

Secondly, they must be *able* to contract. In general, all persons are able to contract themselves in marriage, unless they labour under some particular disabilities, and incapacities. What those are, it will be here our business to inquire.

The disabilities.

Now these disabilities are of two sorts: first, such as are canonical, and therefore sufficient by the ecclesiastical laws to avoid the marriage in the spiritual court; but all of these in our law only made the marriage voidable, and not *ipso facto* void, until sentence of nullity be obtained. Of this nature are pre-contract; some particular corporal infirmities, consanguinity, or relation by blood; and affinity or relation by marriage, but these last, as we have just seen, now render the marriage void.[d] And these canonical disabilities are either grounded upon the express words of the divine law, or are consequences plainly deducible from thence: it therefore being sinful in the persons who labour under them, to attempt to contract matrimony together, they are properly the object of the ecclesiastical magistrate's coercion; in order to separate the offenders, and inflict penance for the offence, *pro salute animarum.* But such marriages, before the recent statute, not being void *ab initio,* but voidable only by sentence of separation, they were esteemed valid to all civil purposes, unless such separation were actually made during the life of the parties. For, after the death of either of them, the courts of common law would not suffer the spiritual court to declare such marriages to have been void; because such declaration could not then tend to the reformation of the parties.[e] And therefore when a man had married his first wife's sister, and after her death the bishop's court was proceeding to annul the marriage and bastardize the issue, the court of king's bench granted a prohibition *quoad hoc;* but permitted them to proceed to punish the husband for incest.[f] But since the recent statute[g] a prohibition, it is conceived, would not be granted. These canonical disabilities being entirely in the province of the ecclesiastical courts, our books are perfectly silent concerning them. But there are a few statutes, which serve as directories to those courts, of which it will be proper to take notice. By statute 32 Hen. VIII. c. 38, it is declared, that all persons may lawfully marry, but such as are prohibited by God's law; and that all marriages contracted by lawful persons in the face of the church, and consummate with bodily knowledge, and fruit of children, shall be indissoluble. And (because in the times of popery a great variety of degrees of kindred were made impediments to marriage, which impediments might however be bought off for money) it is declared by the same statute, that nothing (God's law except) shall impeach any marriage, but within the Levitical degrees: the farthest of which is that between uncle and niece.[h] By the same statute all impediments, arising from pre-contracts to other persons, were abolished and declared of none effect, unless they had been consummated with bodily knowledge: in which case the canon law holds such contract to be a marriage *de facto.* But this branch of the statute was repealed by statute 2 & 3 Edw. VI. c. 23. How far the act of 26 Geo. II. c. 33, (which prohibits all suits in ecclesiastical courts to compel a marriage, in consequence of any contract) may collaterally extend to revive this clause of Henry VIII.'s statute, and abolish the impediment of pre-contract, I leave to be considered by the canonists.

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[b] *Ff.* 50, 17, 30.

[c] Co. Litt. 33.

[d] See *ante* p. 467.

[435]

The canonical disabilities.

The other sort of disabilities are those which are created, or at least enforced, by the municipal laws. And, though some of them may be grounded on natural law, yet they are regarded by the laws of the land, not so much in the light of any moral offence, as on account of the civil inconveniences

Other disabilities.

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[e] Co. Litt. 33.

[f] Salk. 548.

[g] 5 & 6 Wm. IV. c. 54.

[h] Gilb. Rep. 158.

they draw after them. These civil disabilities make the contract void *ab initio*, and not merely voidable; not that they [436] dissolve a contract already formed, but they render the parties incapable of forming any contract at all: they do not put asunder those who are joined together, but they previously hinder the junction. And, if any persons under these legal incapacities come together, it is a meretricious, and not a matrimonial, union.

1. A prior marriage.

1. The first of these legal disabilities is a prior marriage, or having another husband or wife living; in which case, besides the penalties consequent upon it as a felony, the second marriage is to all intents and purposes void:[i] polygamy being condemned both by the law of the New Testament, and the policy of all prudent states, especially in these northern climates. And Justinian, even in the climate of modern Turkey, is express,[j] that "*duas uxores eodem tempore* "*habere non licet.*"

2. Want of age.

2. The next legal disability is want of age. This is sufficient to avoid all other contracts, on account of the imbecility of judgment in the parties contracting; *a fortiori* therefore it ought to avoid this, the most important contract of any. Therefore if a boy under fourteen, or a girl under twelve years of age, marries, this marriage is only inchoate and imperfect; and, when either of them comes to the age of consent aforesaid, they may disagree and declare the marriage void, without any divorce or sentence in the spiritual court. This is founded on the civil law.[k] But the canon law pays a greater regard to the constitution, than the age of the parties;[l] for if they are *habiles ad matrimonium*, it is a good marriage, whatever their age may be. And in our law it is so far a marriage, that, if at the age of consent they agree to continue together, they need not be married again.[m] If the husband be of years of discretion, and the wife under twelve, when she comes to years of discretion, he may disagree as well as she may: for in contracts the obligation must be mutual; both must be bound, or neither: and so it is, *vice versa*, when the wife is of years of discretion, and the husband under.[n]

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[i] Bro. *Abr. Tit. Bastardy*, pl. 8.

[j] *Inst.* 1, 10, 6.

[k] *Leon. Constit.* 109.

[l] *Decretal, l.* 4, *tit.* 2, *qu.* 3.

[m] Co. Litt. 79.

[n] *Ibid.*

[437]

3. Want of consent.

3. Another incapacity arises from want of consent of parents or guardians. By the common law, if the parties themselves were of the age of consent, there wanted no other concurrence to make the marriage valid: and this was agreeable to the canon law. But, by several statutes,[o] penalties of 100*l.* were laid on every clergyman who married a couple either without publication of banns (which might give notice to parents or guardians) or without a license, to obtain which the consent of parents or guardians must be sworn to. And by the statute 4 & 5 Ph. and M. c. 8, whosoever marries any woman child under the age of sixteen years, without consent of parents or guardians, shall be subject to fine, or five years' imprisonment: and her estate during the husband's life shall go to and be enjoyed by the next heir. The civil law indeed required the consent of the parent or tutor at all ages; unless the children were emancipated, or out of the parent's power:[p] and if such consent from the father was wanting, the marriage was null, and the children illegitimate:[q] but the consent of the mother or guardians, if unreasonably withheld, might be redressed and supplied by the judge, or the president of the province:[r] and if the father was *non compos*, a similar remedy was given.[s] These provisions are adopted and imitated by the French and Hollanders, with this difference: that in France neither sons nor daughters can marry without consent of parents till twenty-one years of age;[t] and in Holland, the sons are at their own disposal at twenty-five and the daughters at twenty.[u] Thus at present stands the law in other neighbouring countries. And it was thought proper to introduce somewhat of the same policy into our laws, by statute 26 Geo. II. c. 33, whereby it was enacted, that all marriages celebrated by license (for banns suppose notice) where either of the parties was under twenty one, (not being a widow or widower, who are supposed emancipated) without the consent of the father, or, if he were not living, of the mother or guardians, should be [438]

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[o] 6 & 7 Wm. III. c. 6. 7 & 8 Wm. III. c. 35. 10 Ann. c. 19.

[p] *Ff.* 23, 2, 2, and 18.

[q] *Ff.* 1, 5, 11.

[r] *Cod.* 5, 4, 1 and 20.

[s] *Inst.* 1, 10, 1.

[t] Code Civ. tit. 1, ch. 1. For the old law as to this, see Domat, of Dowries, §. 2. Montesq. Sp. L. 23, 7.

[u] *Vinnius in Inst. l.* 1, *t.* 10.

absolutely void. A like provision was made as in the civil law, where the mother or guardian was a *non compos*, beyond sea, or unreasonably froward, to dispense with such consent at the discretion of the lord chancellor: but no provision was made, in case the father should labour under any mental or other incapacity. Much may be, and much has been, said both for and against this innovation upon our ancient laws and constitution. On the one hand, it prevented the clandestine marriages of minors, which are often a terrible inconvenience to those private families wherein they happen. On the other hand, restraints upon marriages, especially among the lower class, are evidently detrimental to the public, by hindering the increase of the people; and to religion and morality, by encouraging licentiousness and debauchery among the single of both sexes; and thereby destroying one end of society and government, which is *concubitu prohibere vago*. And of this last inconvenience the Roman laws were so sensible, that at the same time that they forbad marriage without the consent of parents or guardians, they were less rigorous upon that very account with regard to other restraints: for, if a parent did not provide a husband for his daughter, by the time she arrived at the age of twenty-five, and she afterwards made a slip in her conduct, he was not allowed to disinherit her upon that account; "*quia non sua* "*culpa, sed parentum, id commisisse cognoscitur.*"[v]

Marriage Act, 4 Geo. IV. c. 76.

For these, and other considerations, this statute has been recently repealed by the 3 Geo. IV. c. 75, and both statutes by the 4 Geo. IV. c. 76, which enacts, (s. 8), that from and after the first of November, 1823, no parson shall be punishable by ecclesiastical censures, for solemnizing a marriage without the consent of parents or guardians, between persons, both or one of whom shall be under twenty-one, after banns published, unless such parson shall have notice of the dissent of such parents or guardians. And if such parents or guardians shall openly declare their dissent at the time of publication, such publication shall be void, and by s. 14, one of the parties shall personally swear that there is no impediment; that one of the parties has, for the space of fifteen days immediately preceding such license, resided within the parish where the marriage is to be solemnized, and where either of the parties not being a widower or widow, shall be under the age of twenty-one, that the consent of the persons whose consent is required has been obtained. But the marriage is not, as before, rendered absolutely void. By s. 16, the father, if living, of any party under twenty-one, not being a widow or widower, or if the father be dead, the guardian of the person of the party so under age, and if no guardian, then the mother, if unmarried, and if married, the guardian appointed by the court of chancery shall have authority to give consent to the marriage of such party: and by s. 17, if the father shall be *non compos*, or the guardian or mother shall be *non compos*, or in parts beyond seas, or shall unreasonably withhold consent, application may be made to the court of chancery, by petition in a summary way, and if the marriage shall appear to be proper, it shall be so declared. And it has been held that the language of the seventeenth section only goes to require consent, and the marriage is not absolutely void if solemnized without it.[w]

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[v] *Nov.* 115, §. 11.

4. Want of reason.

4. A fourth incapacity is want of reason: without a competent share of which, as no other, so neither can the matrimonial contract, be valid.[x] It was formerly adjudged, that the issue of an idiot was legitimate, and consequently that his marriage was valid. A strange determination! since consent is absolutely requisite to matrimony, and neither idiots nor lunatics are capable of consenting to any thing. And therefore the civil law judged much more sensibly when it made such deprivations of reason a previous impediment; though not a cause of divorce, if they happened after marriage.[y] [439] And modern resolutions have adhered to the reason of the civil law, by determining[z] that the marriage of a lunatic, not being in a lucid interval, was absolutely void. But as it might be difficult to prove the exact state of the party's mind at the actual celebration of the nuptials, upon this account (concurring with some private family[a] reasons) the statute 15 Geo. II. c. 30, has provided, that the marriage

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[w] *Rex* v. *Birmingham*, 8 B. & C. 35.

[x] 1 Roll. Abr. 357.

[y] *Ff.* 23, *tit.* 1, *l.* 8, and *tit.* 2, *l.* 16.

[z] Morrison's case, *Coram Delegat.*

[a] See private acts, 23 Geo. II. c. 6.

of lunatics and persons under phrenzies (if found lunatics under a commission, or committed to the care of trustees by any act of parliament) before they are declared of sound mind by the lord chancellor or the majority of such trustees, shall be totally void.

Lastly, the marriage must be had in due form of law.

Lastly, the parties must not only be willing and able to contract, but actually must contract themselves in due form of law, to make it a good civil marriage. Any contract made, *per verba de præsenti*, or in words of the present tense, and in case of cohabitation *per verba de futuro* also, between persons able to contract, was before the act of George II. deemed a valid marriage to many purposes; and the parties might be compelled in the spiritual courts to celebrate it *in facie ecclesiæ*. But these verbal contracts are now of no force, to compel a future marriage.[b] Neither was any marriage valid, that was not celebrated in some parish church or public chapel, unless by dispensation from the archbishop of Canterbury. It must also have been preceded by publication of banns, or by license from the spiritual judge. Many other formalities were likewise prescribed by the act; the neglect of which, though penal, did not invalidate the marriage. It was held to be also essential to a marriage, that it be performed by a person in orders;[c] though the intervention of a priest to solemnize this contract is merely *juris positivi*, and not *juris naturalis aut divini:* it being said that pope Innocent the third was the first who ordained [440] the celebration of marriage in the church;[d] before which it was totally a civil contract. And, in the times of the grand rebellion, all marriages were performed by the justices of the peace; and these marriages were declared valid, without any fresh solemnization, by statute 12 Car. II. c. 33. But, as the law under the statute of George II. stood, Blackstone lays it down that no marriage by the temporal law was *ipso facto void*, that was celebrated by a person in orders,—in a parish church or public chapel (or elsewhere, by special dispensation)—in pursuance of banns or a license, —between single persons,—consenting,—of sound mind,— and of the age of twenty-one years;—or of the age of fourteen in males and twelve in females, with consent of parents or guardians, or without it, in case of widowhood. And no marriage was *voidable* by the ecclesiastical law, after the death of either of the parties; nor during their lives, unless for the canonical impediments of pre-contract, if that indeed even then existed; of consanguinity; and of affinity, or corporal imbecility, subsisting previous to the marriage. But these rules have been greatly altered by several recent statutes. In the first place, by stat. 4 Geo. IV. c. 76, (s. 2), it is enacted, that all banns shall be published in some public chapel in which they may be lawfully published, belonging to the parish wherein the persons to be married shall dwell, upon three Sundays preceding the solemnization of the marriage, and (s. 6), that no minister shall be obliged to publish banns unless the persons to be married shall, seven days previously, deliver to him a notice of their true christian names and surnames, and of the houses of their respective abodes; but it is provided by s. 22, that if any person shall knowingly intermarry without a due publication of banns, and it has been held that if banns be published in the wrong name of the parties, with the knowledge of *both* of them, and there be no evidence to shew that they had ever been known by such names, the marriage is null and void, whether the misdescription arose by mistake or design.[e] And by a more recent statute, the 6 & 7 Wm. IV. c. 85, explained by the 1 Vict. c. 22, a still greater alteration is introduced. Persons may still, if they so please, be married according to the rites of the church of England, after publication of banns, or by license as formerly, or they may be married according to such rites without publication of banns or a license, by producing a certificate from the superintendent registrar of the district, (ss. 1 & 4). But if they object to this form they may be married at the office of the superintendent registrar, (ss. 20, 21); who will enter the marriage in the register book, (s. 23). It is further provided, that any place certified according to law, as a place of religious worship, may be registered for solemnizing marriages therein, (s. 18): and marriages may then be solemnized therein in the presence of some registrar and of

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[b] Stat. 26 Geo. II. c. 33. 4 Geo. IV. c. 76.

[c] Salk. 119.

[d] Moor, 170.

4 Geo. IV. c. 76.

6 & 7 Wm. IV. c. 85.

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[e] *Rex* v. *Tibshelf*, 1 B. & Ad. 195. *Rex* v. *Wraxton*, 4 B. & Ad. 640.

two witnesses, (s. 20). Bishops, with the consent of the patrons, may also license chapels in populous places for the solemnization of marriages according to the rites of the church of England,[f] (s. 26). It is also there enacted, that all persons unduly solemnizing marriage shall be guilty of felony, (s. 39). Every marriage must be celebrated within three calendar months after the entry of the notice thereof in the "marriage book" of the registrar, or the notice must be renewed, (s. 15). And any person authorized so to do may forbid the issuing of the certificate by the superintendent registrar, whereby the notice of marriage and all proceedings under it will be void, (s. 9). These are the principal provisions of this important act.

II. The manner in which marriages may be dissolved.

Two kinds of divorce.

II. I am next to consider the manner in which marriages may be dissolved; and this is either by death, or divorce. There are two kinds of divorce, the one total, the other partial; the one *a vinculo matrimonii*, the other merely *a mensa et thoro*. The total divorce, *a vinculo matrimonii*, must be for some of the canonical causes of impediment before-mentioned; and those, existing *before* the marriage, as is always the case in consanguinity; not supervenient, or arising *afterwards*, as may be the case in affinity or corporal imbecility. For in cases of total divorce, the marriage is declared null, as having been absolutely unlawful *ab initio;* and the parties are therefore separated *pro salute animarum:* for which reason, as was before observed, no divorce can be obtained, but during the life of the parties. The issue of such marriage as is thus entirely dissolved, are bastards.[g]

Divorce a *mensa et thoro.*

[441]

Divorce *a mensa et thoro* is when the marriage is just and lawful *ab initio*, and therefore the law is tender of dissolving it; but, for some supervenient cause, it becomes improper or impossible for the parties to live together: as in the case of intolerable ill temper, or adultery, in either of the parties. For the canon law, which the common law follows in this case, deems so highly and with such mysterious reverence of the nuptial tie, that it will not allow it to be unloosed for any cause whatsoever, that arises after the union is made. And this is said to be built on the divine revealed law; though that expressly assigns incontinence as a cause, and indeed the only cause, why a man may put away his wife and marry another.[h] The civil law, which is partly of pagan original, allows many causes of absolute divorce; and some of them pretty severe ones: (as if a wife goes to the theatre or the public games, without the knowledge and consent of the husband)[i] but among them adultery is the principal, and with reason named the first.[j] But with us in England adultery is only a cause of separation from bed and board:[k] for which the best reason that can be given, is, that if divorces were allowed to depend upon a matter within the power of either of the parties, they would probably be extremely frequent; as was the case when divorces were allowed for canonical disabilities, on the mere confession of the parties,[l] which is now prohibited by the canons.[m] However, divorces *a vinculo matrimonii*, for adultery, have of late years been frequently granted by act of parliament, but not without very strict investigation, and, as a general rule, not until both a jury has given damages in an action for criminal conversation, and a sentence of divorce has been passed in the spiritual courts.

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[f] See also 4 Geo. IV. c. 76, s. 13, and 5 Geo. IV. c. 32, which authorize the bishop to license any place within the parish for solemnizing marriages when a church or chapel is under repair or rebuilding.

[g] Co. Litt. 235.

Divorce a *vinculo matrimonii*

Alimony.

In case of divorce *a mensa et thoro*, the law allows alimony to the wife: which is that allowance, which is made to a woman for her support out of the husband's estate: being settled at the discretion of the ecclesiastical judge, on consideration of all the circumstances of the case. This is sometimes called her *estovers;* for which, if he refuses payment, there is (besides the ordinary process of excommunication) a writ at common law *de estoveris habendis*, in order to recover it.[n] It is generally proportioned to the rank and quality of the parties. But in case of elopement, and living with an adulterer, the law allows her no alimony.[o]

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III. The legal consequences of marriage and its dissolution.

III. Having thus shewn how marriages may be made, or dissolved, I come now, lastly, to speak of the legal consequences of such making, or dissolution.

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[h] Matt. xix. 9.
[i] *Nov.* 117.
[j] *Cod.* 5, 17, 8.
[k] Moor, 683.
[l] 2 Mod. 314.
[m] Can. 1603, c. 105.
[n] 1 Lev. 6.
[o] Cowel, *tit. Alimony.*

Husband and wife one person at law.

Consequence of this rule.

By marriage, the husband and wife are one person in law:[p] that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs every thing; and is therefore called in our law-french a *feme-covert*, *fœmina viro co-operta;* is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*. Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage. I speak not at present of the rights of property, but of such as are merely *personal*. For this reason, a man cannot grant any thing to his wife directly, or enter into covenant with her:[q] for the grant would be to suppose her separate existence; and to covenant with her, would be only to covenant with himself: but a husband may grant to his wife by means of a trustee.[r] However, it is generally true, that all compacts made between husband and wife, when single, are voided by the intermarriage.[s] A woman indeed may be attorney for her husband;[t] for that implies no separation from, but is rather a representation of, her lord. And a husband may also bequeath any thing to his wife by will; for that cannot take effect till the coverture is determined by his death.[u] The husband is bound to provide his wife with necessaries by law, as much as himself: and if she contracts debts for them, he is obliged to pay them;[v] but, for any thing besides necessaries, he is not chargeable.[w] Also if a [443] wife elopes, and lives with another man, the husband is not chargeable even for necessaries:[x] at least if the person, who furnishes them, is sufficiently apprised of her elopement.[y]

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[p] Co. Litt. 112.

[q] *Ibid.*

[r] Harg. not. Co. Litt. 30. See further as to her rights in property, *Principles of Real Property*, pp. 198—200.

[s] Cro. Car. 551.

[t] F. N. B. 27.

[u] Co. Litt. 112.

[v] Salk. 118.

[w] 1 Sid. 120.

[x] Stra. 647.

[y] 1 Lev. 5.

If the wife be indebted before marriage, the husband is bound afterwards to pay the debt; for he has adopted her and her circumstances together.[z] If the wife be injured in her person or her property, she can bring no action for redress without her husband's concurrence, and in his name, as well as her own:[a] neither can she be sued, without making the husband a defendant.[b] There is indeed one case where the wife shall sue and be sued as a *feme sole*, viz. where the husband has abjured the realm, or is banished:[c] for then he is dead in law: and, the husband being thus disabled to sue for or defend the wife, it would be most unreasonable if she had no remedy, or could make no defence at all. In criminal prosecutions, it is true, the wife may be indicted and punished separately;[d] for the union is only a civil union. But in trials of any sort, they are not allowed to be evidence for, or against, each other:[e] partly because it is impossible their testimony should be indifferent; but principally because of the union of persons: and therefore, if they were admitted to be witnesses *for* each other, they would contradict one maxim of law, "*nemo in propria causa testis esse debit;*" and if *against* each other, they would contradict another maxim, "*nemo tenetur seipsum accusare.*" But where the offence is directly against the person of the wife, this rule has been usually dispensed with:[f] and therefore, by statute 3 Hen. VII. c. 2, in case a woman be forcibly taken away, and married, she may be a witness against such her husband, in order to convict him of felony. [444] For in this case she can with no propriety be reckoned his wife; because a main ingredient, her consent, was wanting to the contract: and also there is another maxim of law, that no man shall take advantage of his own wrong: which the ravisher here would do, if by forcibly marrying a woman, he could prevent her from being a witness, who is perhaps the only witness, to that very fact.

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[z] 3 Mod. 186

[a] Salk. 119. 1 Roll. Abr. 347.

[b] Bro. *Error*, 173. 1 Leon. 312. 1 Sid. 120. This was also the practice in the courts of Athens. (Pott. Antiqu. b. 1, c. 21.)

[c] Co. Litt. 133. See *Corbet* v. *Plœnwitz*, K. B. 26 Geo. III.

[d] 1 Hawk. P. C. 3.

[e] 2 Hawk. P. C. 431.

[f] State trials, vol. 1. Lord Audley's case, Stra. 633.

Wife's rights in civil and equity courts.

In the civil law the husband and the wife are considered as two distinct persons; and may have separate estates, contracts, debts, and injuries;[g] and therefore, in our ecclesiastical courts, a woman may sue and be sued without her husband;[h] and also, in courts of equity by means of what is called a next friend, where the interest of the two are adverse.[i]

Where a wife will be held to be acting by compulsion.

But, though our law in general considers man and wife as one person, yet there are some instances in which she is separately considered; as inferior to him, and acting by his compulsion. And therefore all deeds executed, and acts done by her, during her coverture, are void; except in execution of a power, and, since fines were abolished,[j] the deed substituted in lieu of them, in which case she must still be solely and secretly examined, to learn if her act be voluntary.[k] By another recent statute,[l] the right of the wife as to dower is extended to trust estates, but it may be more easily defeated by the act of the husband than heretofore. She cannot by will devise lands to her husband, unless under special circumstances; for at the time of making it she is supposed to be under his coercion.[m] And in some felonies, and other inferior crimes, committed by her, through constraint of her husband, the law excuses her;[n] but this extends not to treason or murder.

How far the husband may correct the wife.

The husband also (by the old law) might give his wife moderate correction.[o] For, as he is to answer for her misbehaviour, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children; for whom the master or parent is also liable in some cases to answer. But this power of correction was confined within reasonable bounds,[p] and the
[445 [husband was prohibited from using any violence to his wife, *aliter quam ad virum, ex causa regiminis et castigationis uxoris suæ, licite et rationabiliter pertinet.*[q] The civil law

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[g] *Cod.* 4, 12, 1.

[h] 2 Roll. Abr. 298.

[i] Mitf. Pl. 22, 83.

[j] 3 & 4 Wm. IV. c. 74.

[k] 3 & 4 Wm. c. 74, ss. 79, 80. see Litt. s. 669, 670.

[l] 3 & 4 Wm. IV. c. 105.

[m] Co. Litt. 112.

[n] 1 Hawk. P. C. 1, s. 9.

[o] *Ibid.* c. 60. s. 23.

[p] Moor. 874.

[q] F. N. B. 80.

gave the husband the same, or a larger, authority over his wife: allowing him, for some misdemeanors, *flagellis et fustibus acriter verberare uxorem;* for others, only *modicam castigationem adhibere.*[m] But, with us, in the politer reign of Charles the second, this power of correction began to be doubted;[n] and a wife may now have security of the peace against her husband;[o] or, in return, a husband against his wife.[p] Yet the lower rank of people, who were always fond of the old common law, still claim and exert their ancient privilege; and the courts of law will still permit a husband to restrain a wife of her liberty, in case of any gross misbehaviour.[q]

These are the chief legal effects of marriage during the coverture; upon which we may observe, that even the disabilities, which the wife lies under, are for the most part intended for her protection and benefit. So great a favourite is the female sex of the laws of England.

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[m] *Nov.* 117, *c.* 14, and Van Leeuwen, *in loc.*

[n] 1 Sid. 113. 3 Keb. 433.

[o] 2 Lev. 128.

[p] Stra. 1207.

[q] Stra. 478, 875.

CHAPTER THE SIXTEENTH.

OF PARENT AND CHILD.

[446] Parent and child. THE next, and the most universal relation in nature is immediately derived from the preceding, being that between parent and child.

Children of two sorts. Children are of two sorts; legitimate, and spurious, or bastards: each of which we shall consider in their order; and, first, of legitimate children.

1. Legitimate children. I. A legitimate child is he that is born in lawful wedlock, or within a competent time afterwards. "*Pater est quem* "*nuptiæ demonstrant*," is the rule of the civil law;[a] and this holds with the civilians, whether the nuptials happen before, or after, the birth of the child. With us in England the rule is narrowed, for the nuptials must be precedent to the birth; of which more will be said when we come to consider the case of bastardy. At present let us inquire into, 1. The legal duties of parents to their legitimate children. 2. Their power over them. 3. The duties of such children to their parents.

1. The duties of parents to provide maintenance. 1. And, first, the duties of parents to legitimate children: which principally consist in three particulars; their maintenance, their protection, and their education.

The duty of parents to provide for the *maintenance* of their children, is a principle of natural law; an obligation, says Puffendorf,[b] laid on them not only by nature herself, but by their own proper act, in bringing them into the world: for they would be in the highest manner injurious to their issue, if they only gave their children life, that they might afterwards see them perish. By begetting them therefore, they have entered into a voluntary obligation, to endeavour as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have a perfect *right* of receiving maintenance from their parents. And the president Montesquieu[c] has a very just observation upon this head: that the establishment of marriage in all civilized states is built on this natural obligation of the father to provide for his children; for that ascertains and makes known the person who is bound to fulfil this obligation: whereas, in promiscuous and illicit conjunctions, the father is unknown; and the mother finds a thousand obstacles in her way;—shame, remorse, the constraint of her sex, and the rigor of laws;—that stifle her inclinations to perform this duty: and besides, she generally wants ability.

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[a] *Ff.* 2, 4, 5.

[b] L. of N. l. 4, c. 11.

Which is enforced by law as by natural affection.

The municipal laws of all well-regulated states have taken care to enforce this duty: though Providence has done it more effectually than any laws, by implanting in the breast of every parent that natural ϛοργη, or insuperable degree of affection, which not even the deformity of person or mind, not even the wickedness, ingratitude, and rebellion of children, can totally suppress or extinguish.

How this is enforced by law.

By the civil law.

The civil law[d] obliges the parent to provide maintenance for his child; and, if he refuses, "*judex de ea re cognoscet.*" Nay, it carries this matter so far, that it will not suffer a parent at his death totally to disinherit his child, without expressly giving his reason for so doing: and there are fourteen such reasons reckoned up,[e] which may justify such disinherison. If the parent alleged no reason, or a bad, or a false one, the child might set the will aside, *tanquam testamentum inofficiosum*, a testament contrary to the natural duty [448] of the parent. And it is remarkable under what colour the children were to move for relief in such a case: by suggesting that the parent had lost the use of his reason when he made the *inofficious* testament. And this, as Puffendorf observes,[f] was not to bring into dispute the testator's power of disinheriting his own offspring; but to examine the motives upon which he did it: and, if they were found defective in reason, then to set them aside. But perhaps this is going rather too far: every man has, or ought to have, by the laws of society, a power over his own property; and, as Grotius very well distinguishes,[g] natural right obliges to give a *necessary* maintenance to children; but what is more than that they have no other right to, than as it is given them by the favour of their parents, or the positive constitutions of the municipal law.

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[c] Sp. L. b. 23, c. 2.

[d] *Ff.* 25, 3, 5.

[e] *Nov.* 115.

[f] *l.* 4, *c.* 11, §. 7.

By our own law.

Let us next see what provision our own laws have made for this natural duty. It is a principle of law,[h] that there is an obligation on every man to provide for those descended from his loins; and the manner, in which this obligation shall be performed, is thus pointed out.[i] The father, and mother, grandfather, and grandmother of poor impotent persons shall maintain them at their own charges, if of sufficient ability, according as the quarter-session shall direct: and this liability is expressly continued by the late poor law act,[j] and[k] if a parent runs away, and leaves his children, the churchwardens and overseers of the parish shall seize his rents, goods, and chattels, and dispose of them toward their relief. By the interpretations which the courts of law made upon these statutes, if a mother or grandmother married again, and was before such second marriage of sufficient ability to keep the child, the husband was charged to maintain it:[l] for this being a debt of hers, when single, like others extended to charge the husband. But at her death, the relation being dissolved, the husband was under no farther obligation. This construction, however, was overruled.[m] And by the late poor law act[n] it is expressly enacted, that a husband is liable to maintain, as a part of his family, the children of his wife, whether legitimate or illegitimate, until the age of sixteen.

To what children the right of maintenance is extended.

[449] No person is bound to provide a maintenance for his issue, unless where the children are impotent and unable to

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[g] *de j. b. and p. l.* 2. *c.* 7, *n.* 3.

[h] Raym. 500.

[i] Stat. 43 Eliz. c. 2.

[j] 4 & 5 Wm. IV. c. 76, ss. 56, and 78.

[k] Stat. 5 Geo. I. c. 8.

[l] Styles, 283. 2 Bulstr. 346.

[m] *Tubb* v. *Harrison*, 4 B. & A. 118. *Cooper* v. *Martin*, 4 East, 76.

[n] 4 & 5 Wm. IV, c. 76, s. 57.

work, either through infancy, disease, or accident; and then is only obliged to find them with necessaries, the penalty on refusal being no more than 20*s*. a month. For the policy of our laws, which are ever watchful to promote industry, did not mean to compel a father to maintain his idle and lazy children in ease and indolence: but thought it unjust to oblige the parent, against his will, to provide them with superfluities, and other indulgencies of fortune; imagining they might trust to the impulse of nature, if the children were deserving of such favours. Yet, as nothing is so apt to stifle the calls of nature as religious bigotry, it is enacted,[o] that if any popish parent shall refuse to allow his protestant child a fitting maintenance, with a view to compel him to change his religion, the lord chancellor shall by order of court constrain him to do what is just and reasonable. But this did not extend to persons of another religion, of no less bitterness and bigotry than the popish: and therefore in the very next year we find an instance of a Jew of immense riches, whose only daughter having embraced christianity, he turned her out of doors; and on her application for relief, as she did not state she was poor, or likely to become chargeable to the parish, it was held she was entitled to none.[p] But this gave occasion[q] to another statute,[r] which ordains, that if Jewish parents refuse to allow their protestant children a fitting maintenance suitable to the fortune of the parent, the lord chancellor on complaint may make such order therein as he shall see proper.

Children may be disinherited by will.

Our law has made no provision to prevent the disinheriting of children by will: leaving every man's property in his own disposal, upon a principle of liberty in this, as well as every other, action: though perhaps it had not been amiss, if the parent had been bound to leave them at the least a [450] necessary subsistence. Indeed, among persons of any rank or fortune, a competence is generally provided for younger children, and the bulk of the estate settled upon the eldest, by the marriage-articles. Heirs also, and children, are favourites of our courts of justice, and cannot be disinherited by any dubious or ambiguous words; there being required the utmost certainty of the testator's intentions to take away the right of an heir.[s]

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[o] Stat. 11 & 12 Wm. III. c 4. 1701.

[p] Lord Raym. 699.

[q] Com. Journ. 18 Feb. 12 Mar.

[r] 1 Ann. st. 1, c. 30.

Protection of children. From the duty of maintenance we may easily pass to that of *protection*, which is also a natural duty, but rather permitted than enjoined by any municipal laws: nature, in this respect, working so strongly as to need rather a check than a spur. A parent may, by our laws, maintain and uphold his children in their law-suits, without being guilty of the legal crime of maintaining quarrels.[t] A parent may also justify an assault and battery in defence of the persons of his children:[u] nay, where a man's son was beaten by another boy, and the father went near a mile to find him, and there revenged his son's quarrel by beating the other boy, of which beating he afterwards unfortunately died; it was not held to be murder, but manslaughter merely.[v] Such indulgence does the law shew to the frailty of human nature, and the workings of parental affection.

Education of children, how far enforced by our law. The last duty of parents to their children is that of giving them an *education* suitable to their station in life: a duty pointed out by reason, and of far the greatest importance of any. For, as Puffendorf very well observes,[w] it is not easy to imagine or allow, that a parent has conferred any considerable benefit upon his child, by bringing him into the world; if he afterwards entirely neglects his culture and education, and suffers him to grow up like a mere beast, to lead a life useless to others, and shameful to himself. Yet [451] the municipal laws of most countries seem to be defective in this point, by not constraining the parent to bestow a proper education upon his children. Perhaps they thought it punishment enough to leave the parent, who neglects the instruction of his family, to labour under those griefs and inconveniences, which his family, so uninstructed, will be sure to bring upon him. Our laws, though their defects in this particular cannot be denied, have in one instance made a wise provision for breeding up the rising generation: since the poor and laborious part of the community, when past the age of nurture, are taken out of the hands of their parents, by the statutes for apprenticing poor children;[w] and are placed out by the public in such manner, as may render their abilities, in their several stations, of the greatest advantage to the commonwealth. The rich indeed are left at their own option, whether they will breed up their children to be ornaments or disgraces to their family. Yet in one case, that of religion, they were under peculiar restrictions: for[x] by several statutes, restrictions were placed on education in the Roman Catholic religion, but these are entirely removed by the statute[y] passed for the emancipation of the Catholics.

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[s] 1 Lev. 130.

[t] 2 Inst. 564.

[u] 1 Hawk. P. C. 131.

[v] Cro. Jac. 296. 1 Hawk. P. C. 83. See Foster, 294.

[w] L. of N. b. 6, c. 2, §. 12.

2. The power of parents over their children.

2. The *power* of parents over their children is derived from the former consideration, their duty: this authority being given them, partly to enable the parent more effectually to perform his duty, and partly as a recompense for his care and trouble in the faithful discharge of it. And upon this score the municipal laws of some nations have given a much larger authority to the parents, than others. The ancient Roman laws gave the father a power of life and death over his children; upon this principle, that he who gave had also the power of taking away.[z] But the rigor of these laws was softened by subsequent constitutions; so that[a] we find a father banished by the emperor Hadrian for killing his son, though he had committed a very heinous crime, upon this maxim, that "*patria potestas in* "*pietate debet, non in atrocitate, consistere.*" But still they maintained to the last a very large and absolute authority: for a son could not acquire any property of his own during the life of his father; but all his acquisitions belonged to the father, or at least the profits of them for his life.[b]

By the English law.

The power of a parent by our English laws is much more moderate; but still sufficient to keep the child in order and obedience. He may lawfully correct his child,

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[w] See page 460.

[x] Stat. 1 Jac. I. c. 4, and 3 Jac. I. c. 5. Stat. 11 & 12 Wm. III. c. 4. Stat. 3 Car. I. c. 2.

[y] 10 Geo. IV. c. 7. See *ante*, p. 99.

[z] *Ff.* 28, 2, 11. *Cod.* 8, 47, 10.

[a] *Ff.* 48, 9, 5.

[b] *Inst*, 2, 9, 1.

being under age, in a reasonable manner;[c] for this is for the benefit of his education. The consent or concurrence of the parent to the marriage of his child under age, was also *directed* by our ancient law to be obtained: and it was until lately absolutely *necessary*, for without it the contract was void;[d] but is now only required under certain circumstances.[e] But this also is another means, which the law has put into the parent's hands, in order the better to discharge his duty; first of protecting his children from the snares of artful and designing persons; and, next, of settling them properly in life, by preventing the ill consequences of too early and precipitate marriages. A father has no other
[453] power over his son's *estate*, than as his trustee or guardian: for, though he may receive the profits during his child's minority, yet he must account for them when he comes of age; but if the child have an independent fortune, he may obtain a reference to a master in chancery, to see whether he be of sufficient ability to afford the child a suitable maintenance.[f] He may indeed have the benefit of his children's labour while they live with him, and are maintained by him: but this is no more than he is entitled to from his apprentices or servants. The legal power of a father (for a mother, as such, is entitled to no power,[g] but only to reverence and respect) the power of a father, I say, over the persons of his children ceases at the age of twenty-one: for they are then enfranchised by arriving at years of discretion, or that point which the law has established (as some must necessarily be established) when the empire of the father, or other guardian, gives place to the empire of reason. Yet, till that age arrives, this empire of the father continues even after his death; for he may by his will appoint a guardian to his children. He may also delegate part of his parental authority, during his life, to the tutor or schoolmaster, of his child: who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge,

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1 Hawk. P. C. 130.

[d] Stat. 26 Geo. II. 33.

[e] 4 Geo IV. c. 76. See *ante*, 472.

[f] *Hughes* v. *Hughes*, 1 Bro. 388.

[g] This has been very recently so held both at law and in equity. *Skinner* v. *Skinner*, 9 Moo. 78. *Rex* v. *Greenhill*, 6 Nev. & M. 244. *Ball* v. *Ball*, 2 Sim. 35.

viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.

3. The duties of children to their parents.

3. The *duties* of children to their parents arise from a principle of natural justice and retribution. For to those, who gave us existence, we naturally owe subjection and obedience during our minority, and honour and reverence ever after: they, who protected the weakness of our infancy, are entitled to our protection in the infirmity of their age; they who by sustenance and education have enabled their offspring to prosper, ought in return to be supported by that offspring, in case they stand in need of assistance. Upon this principle proceed all the duties of children to their parents which are enjoined by positive laws. And the Athenian laws[h] carried this principle into practice with a scrupulous kind of nicety: obliging all children to provide for their father, when fallen into poverty; with an exception to spurious children, to those whose chastity had been prostituted by consent of the father, and to those whom he had not put in any way of gaining a livelihood. [454] The legislature, says baron Montesquieu,[i] considered, that in the first case the father, being uncertain, had rendered the natural obligation precarious; that, in the second case, he had sullied the life he had given, and done his children the greatest of injuries, in depriving them of their reputation; and that, in the third case, he had rendered their life (so far as in him lay) an insupportable burthen, by furnishing them with no means of subsistence.

By our law.

Our laws agree with those of Athens with regard to the first only of these particulars, the case of spurious issue. In the other cases the law does not hold the tie of nature to be dissolved by any misbehaviour of the parent; and therefore a child is equally justifiable in defending the person, or maintaining the cause or suit, of a bad parent, as a good one; and is equally compellable,[j] if of sufficient ability, to maintain and provide for a wicked and unnatural progenitor, as for one who has shewn the greatest tenderness and parental piety.

II. Illegitimate children.

II. We are next to consider the case of illegitimate children, or bastards: with regard to whom let us inquire,

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[h] Potter's Antiq. b. 4, c. 15.

[i] Sp. L. b. 26, c. 5.

[j] Stat. 43 Eliz. c. 2.

1. Who are bastards. 2. The legal duties of the parents towards a bastard child. 3. The rights and incapacities attending such bastard children.

1. Who are bastards.

1. Who are bastards. A bastard, by our English laws, is one that is not only begotton, but born, out of lawful matrimony. The civil and canon laws do not allow a child to remain a bastard, if the parents afterwards intermary;[k] and herein they differ most materially from our law; which, though not so strict as to require that the child shall be *begotten*, yet makes it an indispensable condition, to make it legitimate, that it shall be *born*, after lawful wedlock. And the reason of our English law is surely much superior to that of the Roman, if we consider the principal end and design of establishing the contract of marriage, taken in a civil light; abstractedly from any religious view, which has [455] nothing to do with the legitimacy or illegitimacy of the children. The main end and design of marriage therefore being to ascertain and fix upon some certain person, to whom the care, the protection, the maintenance, and the education of the children should belong: this end is undoubtedly better answered by legitimating all issue born after wedlock, than by legitimating all issue of the same parties, even born before wedlock, so as wedlock afterwards ensues; 1. Because of the very great uncertainty there will generally be, in the proof that the issue was really begotten by the same man; whereas, by confining the proof to the birth, and not to the begetting, our law has rendered it perfectly certain, what child is legitimate, and who is to take care of the child. 2. Because by the Roman law a child may be continued a bastard, or made legitimate, at the option of the father and mother, by a marriage *ex post facto;* thereby opening a door to many frauds and partialities, which by our law are prevented. 3. Because by those laws a man may remain a bastard till forty years of age, and then become legitimate, by the subsequent marriage of his parents; whereby the main end of marriage, the protection of infants, is totally frustrated. 4. Because this rule of the Roman law admits of no limitations as to the time or number of bastards so to be legitimated; but a dozen of them may, twenty years after their birth, by the subsequent

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[k] *Inst,* 1, 10, 13. *Decret. l.* 4, *t.* 17, c. 1.

marriage of their parents, be admitted to all the privileges of legitimate children. This is plainly a great discouragement to the matrimonial state; to which one main inducement is usually not only the desire of having *children*, but also the desire of procreating lawful *heirs*. Whereas our constitutions guard against this indecency, and at the same time give sufficient allowance to the frailties of human nature. For, if a child be begotten while the parents are single, and they will endeavour to make an early reparation for the offence, by marrying within a few months after, our law is so indulgent as not to bastardize the child, if it be born, though not begotten, in lawful wedlock; for this is an incident that can happen but once, since all future children will be begotten, as well as born, within the rules of honour [456] and civil society. Upon reasons like these we may suppose the peers to have acted at the parliament of Merton, when they refused to enact that children born before marriage should be esteemed legitimate.[1] The Scotch law, however, conforms to the civil law in this respect, but a bastard, though thus legitimized in Scotland cannot inherit lands in England.[m]

By our law. From what has been said it appears, that all children born before matrimony are bastards by our law: so it is of all children born so long after the death of the husband, that, by the usual course of gestation, they could not be begotten by him. But, this being a matter of some uncertainty, the law is not exact as to a few days.[n] And this gives occasion to a proceeding at common law, where a widow is suspected to feign herself with child, in order to produce a supposititious heir to the estate: an attempt which the rigor of the Gothic constitutions esteemed equivalent to the most atrocious theft, and therefore punished with death.[o] In this case, with us, the heir presumptive may have a writ *de ventre inspiciendo,* to examine whether she be with child, or not;[p] and, if she be, to keep her under proper restraint, till delivered; which is entirely conformable to the practice of the civil law:[q] but, if the widow be upon due examination found not pregnant, the presumptive heir shall be admitted to the inheritance, though liable to lose it again, on the birth of a child within forty weeks from the death of a husband.[r] But if a man dies, and his widow soon after marries again, and a child is born within such a time, as that by the course of nature it might have been the child of either husband; in this case he is said to be more than ordinarily legitimate; for he may, when he arrives to years of discretion, choose which of the fathers he pleases.[s] To prevent this, among other inconveniences, the civil law ordained that no widow should marry *infra annum luctus,*[t] [457] a rule which obtained so early as the reign of Augustus,[u] if not of Romulus: and the same constitution was probably handed down to our early ancestors from the Romans, during their stay in this island; for we find it established under the Saxon and Danish governments.[v]

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[1] *Rogaverunt omnes episcopi magnates, ut consentirent quod nati ante matrimonium essent legitimi, sicut illi qui nati sunt post matrimonium, quia ecclesia tales habet pro legitimis. Et omnes comites et barones una voce responderunt, quod nolunt leges Angliæ mutare quæ hucusque usitatæ sunt et approbatæ.* Stat. 20 Hen. III. c. 9. See the introduction to the great charter, *edit. Oxon.* 1759, *sub anno* 1253.

[m] *Doe* v. *Vardill*, 5 B. & C. 438. 6 Bli. 479, N. S. 9 Bli. 32, N. S.

[n] Cro. Jac. 541.

[o] Stiernhook *de jure Gothor. l.* 3, *c.* 5.

What children born in wedlock are bastards.

As bastards may be born before the coverture or marriage state is begun, or after it is determined, so also children born during wedlock may in some circumstances be bastards. As if the husband be out of the kingdom of England, (or, as the law somewhat loosely phrases it, *extra quatuor maria*) for above nine months, so that no access to his wife can be presumed, her issue during that period shall be bastards.[w] But, generally, during the coverture access of the husband shall be presumed, unless the contrary can be shown;[x] which may however be proved either by showing him to be elsewhere, or that access did not take place, or was impossible: for the general rule is, *præsumitur pro legitimatione.*[y] In a divorce, *a mensa et thoro,* if the wife breeds children, they are bastards; for the law will presume the husband and wife conformable to the sentence of separation, unless access be proved: but, in a voluntary separation by agreement, the law will suppose access, unless the negative be shown.[y] So also if there is an apparent impossibility of procreation on the part of the husband, as if he be only eight years old, or the like, there the issue of the wife shall be bastard.[z] Likewise, in case of divorce in the spiritual court *a vinculo matrimonii*, all the issue born during the coverture are bastards;[a] because such divorce is always upon some cause, that rendered the marriage unlawful and null from the beginning.

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[p] Co. Litt. 8. Bract. *l.* 2, *c.* 32.

[q] *Ff.* 25, *tit.* 4, *per tot.*

[r] Britton. *c.* 66, *p.* 166.

[s] Co. Litt. 8.

[t] *Cod.* 5, 9, 2.

[u] But the year was then only *ten* months. Ovid. *Fast. I.* 27.

[v] *Sit omnis vidua sine marito duodecim menses. L. L. Ethelr. A. D.* 1008. *L. L. Canut. c.* 71.

[w] Co. Litt. 244.

[x] Salk. 123. 3 P. W. 276. Stra. 925.

[y] 5 Rep. 98. See *Morris* v. *Davis,* 3 Car. & P. 215, 427, and the Banbury Peerage case, which is separately reported.

2. The duty of parents to their bastard children.

2. Let us next see the duty of parents to their bastard children, by our law; which is principally that of maintenance. For, though bastards are not looked upon as children to any civil purposes, yet the ties of nature, of which maintenance is one, are not so easily dissolved: and they hold indeed as to many other intentions; as, particularly, that a man shall not marry his bastard sister or daughter.[b] [458] The civil law, therefore, when it denied maintenance to bastards begotten under certain atrocious circumstances,[c] was neither consonant to nature, nor reason; however profligate and wicked the parents might justly be esteemed.

By our law.

The method in which the English law provides maintenance for them has been recently greatly altered. By the former law, when a woman was delivered, or declared herself with child, of a bastard, and would by oath before a justice of peace charge any person as having got her with child, the justice was to cause such person to be apprehended, and commit him till he gave security, either to maintain the child, or appear at the next quarter-sessions to dispute and try the fact. But if the woman died, or was married before delivery, or miscarried, or proved not to have been with child, the person was discharged: otherwise the sessions, or two justices out of sessions, upon original application to them, might have taken order for the keeping of the bastard, by charging the mother or the reputed father with the payment of money or other sustentation for that purpose. And if such putative father, or lewd mother, ran away from the parish, the overseers by direction of two justices might seize their rents, goods, and chattels, in order to bring up the said bastard child. Yet such was the humanity of the law, that no woman could be compulsively questioned concerning the father of her child, till one month after her delivery: which indulgence was however very frequently a hardship upon parishes, by giving the parents opportunity to escape. But by the Poor Law Act, 4 & 5 Wm. IV. c. 76, ss. 69 & 70, all previous statutes on this subject are repealed; and by s. 71, it is enacted, that every child which shall be born a bastard, after the passing of the act, shall follow the settlement of the mother until he shall attain sixteen, or shall acquire a settlement in his own right, and such mother shall be bound to maintain such child as part of her family, until sixteen; and such liability is to cease on marriage. By s. 72, if such child shall become chargeable to the parish the overseers or guardians may, after diligent inquiry as to the father, apply to the quarter-sessions for an order on the putative father, and the court may make such order, provided the evidence of the mother be corroborated by other testimony, but such order shall in no case continue in force after the child shall attain seven years. Provision is also made by the act for enforcing the order, (ss. 73-78.)

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[y] Salk. 123.

[z] Co. Litt. 244.

[a] *Ibid.* 235.

[b] Lord Raym. 68. Comb. 356.

[c] *Nov.* 89, *c.* 15.

3. The rights and incapacities of bastards.

3. I proceed next to the rights and incapacities which appertain to a bastard. The rights are very few, being only such as he can *acquire;* for he can *inherit* nothing, being looked upon as the son of nobody, and sometimes called *filius nullius*, sometimes *filius populi.*[d] Yet he may gain a [459] surname by reputation,[e] though he has none by inheritance.[f] All other children have their primary settlement in their father's parish; but a bastard, by the old law, was settled in the parish where born, for he hath no father.[g] However, in case of fraud, as if a woman were sent either by order of justices, or came to beg as a vagrant to a parish which she did not belong to, and dropped her bastard there; the bastard, in the first case, was settled in

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[d] *Fort. de L. L. c.* 40.

[e] Co. Litt. 3.

[f] Salk. 427.

the parish from whence she was illegally removed;[h] or, in the latter case, in the mother's own parish, if the mother be apprehended for her vagrancy.[i] Bastards also, born in any licensed hospital for pregnant women, were settled in the parishes to which the mothers belong;[j] and this, by the new poor law, as we have just seen,[k] is now the universal rule. The incapacity of a bastard consists principally in this, that he cannot be heir to any one, neither can he have heirs, but of his own body; for being *nullius filius*, he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived. A bastard was also, in strictness, incapable of holy orders; and, though that were dispensed with, yet he was utterly disqualified from holding any dignity in the church:[l] but this doctrine seems now obsolete; and in all other respects, there is no distinction between a bastard and another man. And really any other distinction, but that of not inheriting, which civil policy renders necessary, would, with regard to the innocent offspring of his parents' crimes, be odious, unjust, and cruel to the last degree: and yet the civil law, so boasted of for its equitable decisions, made bastards in some cases incapable even of a gift from their parents.[m] A bastard may, lastly, be made legitimate, and capable of inheriting, by the transcendent power of an act of parliament, and not otherwise:[n] as was done in the case of John of Gant's bastard children, by a statute of Richard the second.

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[h] Salk. 121.

[i] Stat. 17 Geo II. c. 5.

[j] Stat. 13 Geo. III. c. 82.

[k] See *ante*, p. 494.

[l] Fortesc. c. 40. 5 Rep. 58.

[m] *Cod.* 6, 57, 5.

[n] 4 Inst. 36.

CHAPTER THE SEVENTEENTH.

OF GUARDIAN AND WARD.

[460] **Division of the subject of this chapter.** THE only general private relation, now remaining to be discussed is that of guardian and ward; which bears a very near resemblance to the last, and is plainly derived out of it: the guardian being only a temporary parent, that is, for so long time as the ward is an infant, or under age. In examining this species of relationship, I shall first consider the different kinds of guardians, how they are appointed, and their power and duty: next, the different ages of persons, as defined by the law: and lastly, the privileges and disabilities of an infant, or one under age and subject to guardianship.

1. The different kinds of guardians. 1. The guardian with us performs the office both of the *tutor* and *curator* of the Roman laws; the former of which had the charge of the maintenance and education of the minor, the latter the care of his fortune; or, according to the language of the court of chancery, the *tutor* was the committee of the person, the *curator* the committee of the estate. But this office was frequently united in the civil law;[a] as it is always in our law with regard to minors, though as to lunatics and idiots it is commonly kept distinct.

[461] **The several species of guardians.** Of the several species of guardians, the first are guardians *by nature:* viz. the father and (in some cases) the mother of the child. For if an estate be left to an infant, the father is by common law the guardian, and must account to his child for the profits.[b] And, with regard to daughters, it seems by construction of the statute 4 & 5 Ph. & Mar. c. 8,

[a] *Ff.* 26, 4, 1.

[b] Co. Litt. 88.

that the father might by deed or will assign a guardian to any woman-child under the age of sixteen; and, if none be so assigned, the mother shall in this case be guardian.[c] There are also guardians *for nurture*;[d] which are, of course, the father or mother, till the infant attains the age of fourteen years:[e] and in default of father or mother, the ordinary usually assigns some discreet person to take care of the infant's personal estate, and to provide for his maintenance and education,[f] although his power to do so has been questioned.[g] Next are guardians *in socage*, who are also called guardians *by the common law*. These take place only when the minor is entitled to some estate in lands, and then by the common law the guardianship devolves upon his next of kin, to whom the inheritance cannot possibly descend; as, where the estate descended from his father, in this case his uncle by the mother's side cannot possibly inherit this estate, and therefore shall be the guardian.[h] For the law judges it improper to trust the person of an infant in his hands, who may by possibility become heir to him; that there may be no temptation, nor even suspicion of temptation, for him to abuse his trust.[i] The Roman laws proceed on a quite contrary principle, committing the care of the minor to him who is the next to succeed to the inheritance, presuming that the next heir would take the best care of an estate, to which he has a prospect of succeeding: and this they boast to be "*summa providentia*.[j] But in the meantime they seem to have forgotten, how much it is the guardian's [462] interest to remove the incumbrance of his pupil's life from that estate for which he is supposed to have so great a regard.[k] And this affords Fortescue,[l] and sir Edward

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[c] 3 Rep. 39.

[d] Co. Litt. 88.

[e] Moor, 738. 3 Rep. 38.

[f] 2 Jones, 90. 2 Lev. 163.

[g] *Buck* v. *Draper*, 3 Atk. 631. 3 Burr. 1436.

[h] Litt. §. 123.

[i] *Nunquam custodia alicujus de jure alicui remanet, de quo habeatur suspicio, quod possit vel velit aliquod jus in ipsa hæreditate clamare.* Glanv. *l.* 7, *c.* 11.

[j] *Ff.* 26, 4, 1.

[k] The Roman satirist was fully aware of this danger, when he puts this private prayer into the mouth of a selfish guardian;

> —*pupillum o utinam quem proximus hæres*
> *Impello, expungam.* Pers. 1. 12.

[l] C. 44.

Coke,[m] an ample opportunity for triumph; they affirming, that to commit the custody of an infant to him that is next in succession is "*quasi agnum committere lupo, ad devorandum.*"[n] These guardians in socage, like those for nurture, continue only till the minor is fourteen years of age; for then, in both cases, he is presumed to have discretion, so far as to choose his own guardian. This he may do, unless one be appointed by the father, by virtue of the statute 12 Car. II. c. 24, confirmed by 1 Vict. c. 26, s. 1, which, considering the imbecility of judgment in children of the age of fourteen, and the abolition of guardianship *in chivalry* (which lasted till the age of twenty-one, and of which we shall speak hereafter) enacts, that any father, under age or of full age, may by deed or will dispose of the custody of his child, either born or unborn, to any person, except a popish recusant, either in possession or reversion, till such child attains the age of one and twenty years. These are called guardians *by statute*, or *testamentary* guardians. There are also special guardians *by custom* of London, and other places;[o] but they are particular exceptions, and do not fall under the general law.

The power and duty of a guardian and ward.

The power and reciprocal duty of a guardian and ward are the same, *pro tempore*, as that of a father and child; and therefore I shall not repeat them: but shall only add, that the guardian, when the ward comes of age, is bound to give [463] him an account of all that he has transacted on his behalf, and must answer for all losses by his wilful default or negligence. In order therefore to prevent disagreeable contests with young gentlemen, it has become a practice for many guardians, of large estates especially, to indemnify themselves by applying to the court of chancery, acting under its direction, and accounting annually before the officers of that court. For the lord chancellor is, by right derived from the crown, the general and supreme guardian of all infants, as well as idiots and lunatics; that is, of all such persons as have not discretion enough to manage their own concerns. In case therefore any guardian abuses his trust, the court will check and punish him; nay sometimes will proceed to the removal of him, and appoint another in his stead.[p]

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[m] 1 Inst. 88.

[n] See Stat. *Hibern.* 14 Hen. III. This policy of our English law is warranted by the wise institutions of Solon, who provided that no one should be another's guardian, who was to enjoy the estate after his death. (Potter's Antiq. b. 1, c. 26.) And Charondas, another of the Grecian legislators, directed that the inheritance should go to the father's relations, but the education of the child to the mother's; that the guardianship and right of succession might always be kept distinct. (Petit. *Leg. Att. l.* 6, *t.* 7.)

[o] Co. Litt. 88.

2. The ward, when of age.

2. Let us next consider the ward or person within age, for whose assistance and support these guardians are constituted by law; or who it is, that is said to be within age. The ages of male and female are different for different purposes. A male at *twelve* years old may take the oath of allegiance; at *fourteen* is at years of discretion, and therefore may consent or disagree to marriage, may choose his guardian, and, if his discretion were actually proved, might make his testament of his personal estate; but no will of any person under twenty-one executed after the 1st of January 1838, shall be valid; but at *seventeen* he may be an executor; and at *twenty-one* is at his own disposal, and may alien his lands, goods, and chattels. A female also at *seven* years of age may be betrothed or given in marriage; at *nine* is entitled to dower; at *twelve* is at years of maturity, and therefore may consent or disagree to marriage, and, if proved to have sufficient discretion, might, before the recent act,[q] bequeath her personal estate; but this, as we have seen, is now altered; but at *fourteen* she is at years of legal discretion, and may choose a guardian; at *seventeen* may be executrix; and at *twenty-one* may dispose of herself and her lands. So that full age in male or female is twenty-one years, which age is completed on the day preceding the anniversary of a person's birth;[r] who till that time is an infant, and so styled in law. Among the ancient Greeks and Romans *women* were never of age but subject to perpetual guardianship,[s] 464]
unless when married "*nisi convenissent in manum viri*:" and, when that perpetual tutelage wore away in process of time, we find that, in females as well as males, full age was not till twenty-five years.[t] Thus by the constitution of

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[p] 1 Sid. 424. 1 P. Wms. 703.

[q] 1 Vict. c. 26, s. 7.

[r] Salk. 44, 625. Lord Raym. 480. 1096. *Toder* v. *Sansam*. *Dom. Proc.* 27 Feb. 1775.

[s] Pott. Antiq. b. 4, c. 11. Cic. *pro Muren*. 12.

[t] *Inst.* 1, 23, 1.

different kingdoms, this period, which is merely arbitrary, and *juris positivi*, is fixed at different times. Scotland agrees with England in this point; (both probably copying from the old Saxon constitutions on the continent, which extended the age of minority "*ad annum vigesimum primum,* "*et eo usque juvenes sub tutelam reponunt*"[t]) but in Naples they are of full age at *eighteen;* in France, with regard to marriage, not till *twenty-one;* and in Holland at *twenty-five.*

3. Infants, their privileges and disabilities.

3. Infants have various privileges, and various disabilities: but their very disabilities are privileges; in order to secure them from hurting themselves by their own improvident acts. An infant when sued appears to defend his cause by guardian; for he is to defend him against all attacks as well by law as otherwise:[u] but he may sue either by his guardian, or *prochein amy*, his next friend who is not his guardian. This *prochein amy* may be any person who will undertake the infant's cause; and it frequently happens, that an infant, by his *prochein amy*, institutes a suit in equity against a fraudulent guardian. In criminal cases, an infant of the age of *fourteen* years may be capitally punished for any capital offence:[v] but under the age of *seven* he cannot. The period between *seven* and *fourteen* is subject to much uncertainty: for the infant shall, generally speaking, be judged *primâ facie* innocent; yet if he was *doli capax*, and could discern between good and evil at the time of the offence committed, he may be convicted and undergo judgment and execution of death, though he hath not attained [465] to years of puberty or discretion.[w] And sir Matthew Hale gives us two instances, one of a girl of thirteen, who was burned for killing her mistress; another of a boy still younger, that had killed his companion, and hid himself, who was hanged; for it appeared by his hiding that he knew he had done wrong, and could discern between good and evil: and in such cases the maxim of law is, that

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[t] Stiernhook *de jure Sueonum. l.* 2, *c.* 2. This is also the period when the king, as well as the subject, arrives at full age in modern Sweden. Mod. Un. Hist. xxxiii. 220. Her present majesty was declared by act of parliament to be of age at eighteen. See *ante* p. 261, n.

[u] Co. Litt. 135. Mr. J. Coleridge's note.

[v] 1 Hal. P. C. 25.

[w] 1 Hal. P. C. 26.

malitia supplet ætatem. So also, in much more modern times, a boy of ten years old, who was guilty of a heinous murder, was held a proper subject for capital punishment, by the opinion of all the judges.[x]

With regard to estates and civil property, an infant hath many privlieges, and this may be said in general, that an infant shall lose nothing by non-claim, or neglect of demanding his right; nor shall any other *laches* or negligence be imputed to an infant, except in some very particular cases.

How far an infant can aliene.

It is generally true, that an infant can neither aliene his lands, nor do any legal act, nor make a deed, nor indeed any manner of contract, that will bind him. But still to all these rules there are some exceptions: part of which were just now mentioned in reckoning up the different capacities which they assume at different ages: and there are others, a few of which it may not be improper to recite, as a general specimen of the whole. And, first, it is true, that infants cannot aliene their estates: but infant trustees, or mortgagees, are enabled to convey, under the direction of the court of chancery or exchequer, or other courts of equity, the estates they hold in trust or mortgage, to such person as the court shall appoint.[y] Also it is generally true, that an infant can do no legal act: yet, an infant, who has an advowson, may present to the benefice when it becomes void.[z] For the law in this case dispenses with one rule, in order to maintain others of far greater consequence: it permits an [466] infant to present a clerk (who, if unfit, may be rejected by the bishop) rather than either suffer the church to be unserved till he comes of age, or permit the infant to be debarred of his right by lapse to the bishop. An infant may also purchase lands, but his purchase is incomplete: for, when he comes to age, he may either agree or disagree to it, as he thinks prudent or proper, without alleging any reason; and so may his heirs after him, if he dies without having completed his agreement.[a] It is, farther, generally true, that an infant, under twenty-one, can make no deed but what is afterwards voidable: yet in some cases[b] he may bind himself apprentice by deed indented or indentures, for seven years; and[c] he may by deed or will appoint a guardian to his children, if he has any. Lastly, it is generally true, that an infant can make no other contract that will bind him: yet he may bind himself to pay for his necessary meat, drink, apparel, physic, and such other necessaries; and likewise for his good teaching and instruction, whereby he may profit himself afterwards.[d] And thus much, at present, for the privileges and disabilities of infants.

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[x] Foster, 72.

[y] 1 Wm. IV. c. 60. 4 & 5 Wm. IV. c. 23. 1 & 2 Vict. c. 69.

[z] Co. Litt. 172.

[a] *Ibid.* 2.

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[b] Stat. 5 Eliz. c. 4. 43 Eliz. c. 2. Cro. Car. 179.

[c] Stat. 12 Car. II. c. 24. And see *Zouch* v. *Parsons*, 3 Burr. 1794.

[d] Co. Litt. 172.

CHAPTER THE EIGHTEENTH.

OF CORPORATIONS.

WE have hitherto considered persons in their natural [467] capacities, and have treated of their rights and duties. But, as all personal rights die with the person; and, as the necessary forms of investing a series of individuals, one after another, with the same identical rights, would be very inconvenient, if not impracticable; it has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality.

The advantages of perpetuating rights

These artificial persons are called bodies politic, bodies corporate, *(corpora corporata)* or corporations: of which there is a great variety subsisting, for the advancement of religion, of learning, and of commerce; in order to preserve entire and for ever those rights and immunities, which, if they were granted only to those individuals of which the body corporate is composed, would upon their death be utterly lost and extinct. To shew the advantages of these incorporations, let us consider the case of a college in either of our universities, founded *ad studendum et orandum*, for the encouragement and support of religion and learning. If this were a mere voluntary assembly, the individuals which compose it might indeed read, pray, study, and perform scholastic exercises together, so long as they could agree to do so: but they could neither frame, nor receive [468] any laws or rules of their conduct; none at least, which

by means of corporations,

would have any binding force, for want of a coercive power to create a sufficient obligation. Neither could they be capable of retaining any privileges or immunities: for, if such privileges be attacked, which of all this unconnected assembly has the right, or ability, to defend them? And, when they are dispersed by death or otherwise, how shall they transfer these advantages to another set of students equally unconnected as themselves? So also, with regard to holding estates or other property, if land be granted for the purposes of religion or learning to twenty individuals not incorporated, there is no legal way of continuing the property to any other persons for the same purposes, but by endless conveyances from one to the other, as often as the hands are changed. But when they are consolidated and united into a corporation, they and their successors are then considered as one person in law: as one person, they have one will, which is collected from the sense of the majority of the individuals: this one will may establish rules and orders for the regulation of the whole, which are a sort of municipal laws of this little republic; or rules and statutes may be prescribed to it at its creation, which are then in the place of natural laws: the privileges and immunities, the estates and possessions, of the corporation, when once vested in them, will be for ever vested, without any new conveyance to new successions; for all the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law, a person that never dies: in like manner as the river Thames is still the same river, though the parts which compose it are changing every instant.

which were originally invented by the Romans.

The honour of originally inventing these political constitutions entirely belongs to the Romans. They were introduced, as Plutarch says, by Numa; who finding, upon his accession, the city torn to pieces by the two rival factions of Sabines and Romans, thought it a prudent and politic measure to subdivide these two into many smaller [469] ones, by instituting separate societies of every manual trade and profession. They were afterwards much considered by the civil law,[a] in which they were called *universitates*, as forming one whole out of many individuals; or *collegia*, from being gathered together: they were adopted also by the canon law, for the maintenance of ecclesiastical discipline; and from them our spiritual corporations are derived. But our laws have considerably refined and improved upon the invention, according to the usual genius of the English nation: particularly with regard to sole corporations, consisting of one person only, of which the Roman lawyers had no notion; the maxim being that "*tres faciunt collegium*."[b] Though they held, that if a corporation, originally consisting of three persons, be reduced to one, "*si universitas ad* "*unum redit*," it may still subsist as a corporation, "*et stet* "*nomen universitatis*."[c]

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[a] *Ff. l. 3. t. 4, per tot.*

but improved on by the English.

Before we proceed to treat of the several incidents of corporations, as regarded by the laws of England, let us first take a view of the several sorts of them; and then we shall be better enabled to apprehend their respective qualities.

Corporations are divided into aggregate and sole.

The first division of corporation is into *aggregate* and *sole*. Corporations aggregate consist of many persons united together into one society, and are kept up by a perpetual succession of members, so as to continue for ever: of which kind are the mayor and commonalty of a city, the head and fellows of a college, the dean and chapter of a cathedral church. Corporations sole consist of one person only and his successors, in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had. In this sense the king is a sole corporation:[d] so is a bishop: so are some deans, and prebendaries, distinct from their several chapters: and so is every parson and vicar. And the necessity, or at least use, of this institution will be very apparent, if we consider the case of a parson of a [470] church. At the original endowment of parish churches, the freehold of the church, the churchyard, the parsonage house, the glebe, and the tithes of the parish, were vested in the then parson by the bounty of the donor, as a temporal recompense to him for his spiritual care of the inhabitants, and with intent that the same emoluments should ever afterwards continue as a recompense for the same care. But how was this to be effected? The freehold was vested in the parson; and, if we suppose it vested in his natural capacity, on his death it might descend to his heir, and would be liable to his debts and incumbrances: or, at best, the heir might be compellable, at some trouble and expense, to convey these rights to the succeeding incumbent. The law therefore has wisely ordained, that the parson, *quatenus* parson, shall never die, any more than the king; by making him and his successors a corporation. By which means all the original rights of the parsonage are preserved entire to the successor: for the present incumbent, and his predecessor who lived seven centuries ago, are in law one and the same person; and what was given to the one was given to the other also.

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[b] *Ff.* 50, 16, 8.

[c] *Ff.* 3, 4, 7.

[d] Co. Litt. 43.

and also into ecclesiastical and lay.

Another division of incorporations, either sole or aggregate, is into *ecclesiastical* and *lay*. Ecclesiastical corporations are where the members that compose it are entirely spiritual persons; such as bishops; certain deans, and prebendaries; all archdeacons, parsons, and vicars; which are sole corporations: deans and chapters at present, and formerly prior and convent, abbot and monks, and the like, bodies aggregate. These are erected for the furtherance of religion, and perpetuating the rights of the church. Lay corporations are of two sorts, *civil* and *eleemosynary*. The civil are such as are erected for a variety of temporal purposes. The king, for instance, is made a corporation to prevent in general the possibility of an *interregnum* or vacancy of the throne, and to preserve the possessions of the crown entire; for, immediately upon the demise of one king, his successor is, as we have formerly seen, in full possession of the regal rights and dignity. Other lay corporations [471] are erected for the good government of a town or particular district, as a mayor and commonalty, bailiff and burgesses, or the like: some for the advancement and regulation of manufactures and commerce; as the trading companies of London, and other towns: and some for the better carrying on of divers special purposes; as churchwardens, for conservation of the goods of the parish; the college of physicians and company of surgeons in London,

Lay corporations are either civil or eleemosynary.

for the improvement of the medical science; the royal society, for the advancement of natural knowledge; and the society of antiquaries, for promoting the study of antiquities. And among these I am inclined to think the general corporate bodies of the universities of Oxford and Cambridge must be ranked: for it is clear they are not spiritual or ecclesiastical corporations, being composed of more laymen than clergy: neither are they eleemosynary foundations, though stipends are annexed to particular magistrates and professors, any more than other corporations where the acting officers have standing salaries; for these are rewards *pro opera et labore*, not charitable donations only, since every stipend is preceded by service and duty: they seem therefore to be merely civil corporations. The eleemosynary sort are such as are constituted for the perpetual distribution of the free alms, or bounty, of the founder of them to such persons as he has directed. Of this kind are all hospitals for the maintenance of the poor, sick, and impotent; and all colleges, both *in* our universities and *out*[e] of them: which colleges, are founded for two purposes; 1. For the promotion of piety and learning by proper regulations and ordinances. 2. For imparting assistance to the members of those bodies, in order to enable them to prosecute their devotion and studies with greater ease and assiduity. And all these eleemosynary corporations are, strictly speaking, lay and not ecclesiastical, even though composed of ecclesiastical persons,[f] and although they in some things partake of the nature, privileges, and restrictions of ecclesiastical bodies.

[472] Having thus marshalled the several species of corporations, let us next proceed to consider, 1. How corporations, in general, may be created. 2. What are their powers, capacities, and incapacities. 3. How corporations are visited. And 4. How they may be dissolved.

I. How corporations may be created.

1. Corporations, by the civil law, seem to have been created by the mere act, and voluntary association of their members; provided such convention was not contrary to law, for then it was *illicitum collegium*.[g] It does not appear that

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[e] Such as at Manchester, Eton, Winchester, &c.

[f] 1 Lord Raym. 6.

[g] *Ff.* 47, 22, 1. *Neque societas,*

the prince's consent was necessary to be actually given to the foundation of them; but merely that the original founders of these voluntary and friendly societies (for they were little more than such) should not establish any meetings in opposition to the laws of the state.

The royal consent is necessary.

But, with us in England, the king's consent is absolutely necessary to the erection of any corporation, either impliedly or expressly given.[h] The king's implied consent is to be found in corporations which exist by force of the *common law*, to which our former kings are supposed to have given their concurrence; common law being nothing else but custom, arising from the universal agreement of the whole community. Of this sort are the king himself, all bishops, parsons, vicars, churchwardens, and some others; who by common law have ever been held (as far as our books can shew us) to have been corporations, *virtute officii:* and this incorporation is so inseparably annexed to their offices, that we cannot frame a complete legal idea of any of these persons, but we must also have an idea of a corporation, capable
[473] to transmit his rights to his successors, at the same time. Another method of implication, whereby the king's consent is presumed, is as to all corporations by *prescription*, such as the city of London, and many others,[i] which have existed as corporations, time whereof the memory of man runneth not to the contrary; and therefore are looked upon in law to be well created. For though the members thereof can shew no legal charter of incorporation, yet in cases of such high antiquity the law presumes there once was one: and that by the variety of accidents, which a length of time may produce, the charter is lost or destroyed. The methods by which the king's consent is expressly given, are either by act of parliament or charter. By act of parliament, of which the royal assent is a necessary ingredient, corpora-

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neque collegium, neque hujusmodi corpus passim omnibus habere conceditur; nam et legibus, et senatus consultis, et principalibus constitutionibus ea res coercetur *Ff.* 3, 4, I.

[h] Cities and towns were first erected into corporate communities on the continent, and endowed with many valuable privileges, about the eleventh century. (Roberts. Cha. V. i. 30,) to which the consent of the feudal sovereign was absolutely necessary, as many of his prerogatives and revenues were thereby considerably diminished.

[i] 2 Inst. 330.

tions may undoubtedly be created:[j] but it is observable, that (till of late years) most of those statutes, which are usually cited as having created corporations, do either confirm such as have been before created by the king; as in the case of the college of physicians erected by charter 10 Hen. VIII.[k] which charter was afterwards confirmed in parliament;[l] or, they permit the king to erect a corporation *in futuro* with such and such powers; as is the case of the bank of England,[m] and the society of the British fishery.[n] So that the immediate creative act was usually performed by the king alone, in virtue of his royal prerogative.[o]

All other methods may be reduced to that of the king's letters patent.

All the other methods therefore whereby corporations exist, by common law, by prescription, and by act of parliament, are for the most part reducible to this of the king's letters patent, or charter of incorporation. The king's creation may be performed by the words "*creamus, erigimus,* "*fundamus, incorporamus,*" or the like. Nay it is held, that if the king grants to a set of men to have *gildam mercatoriam*, a mercantile meeting or assembly,[p] this is alone sufficient [474] to incorporate and establish them for ever.[q]

Municipal corporation act, 5 & 6 Wm. IV. c. 76.

By a very recent statute, 5 & 6 Wm. IV. c. 76, which, however, is of more importance on political than legal considerations; the municipal corporations throughout England and Wales are regulated, much increased, extended, and remodelled, those of Scotland having been dealt with by the statute 3 & 4 Wm. IV. cc. 76 & 77. The corporate body are elected by burgesses, who are all male persons of full age, who on the last day of August in any year, have occupied houses and shops rated for three years to the relief of the poor, if they be resident householders within seven miles of the borough, (s. 9). On the 5th day of September in every year the overseers are to make an alphabetical list, called the "Burgess list," of all persons entitled to be burgesses, (s. 15); which list is to be revised by the mayor and two assessors between the 1st and 15th of October, and this list is to be complete on the 22nd of October, (s. 22); and in the month of November a certain number of aldermen and councillors are to be annually elected, and to go out by rotation, (ss. 25 & 36). The various provisions of this act need not here be detailed. It seems sufficient to observe, that they regulate the power of the council and its officers, the administration of justice, and the mode of dealing with the funds and property of the corporation. This act has been amended by the 7 Wm. IV. and 1 Vict. c. 78.

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[j] 10 Rep 29. 1 Roll. Abr. 512.

[k] 8 Rep. 114.

[l] 14 & 15 Hen. VIII. c. 5.

[m] Stat. 5 & 6 W. & M. c. 20.

[n] Stat. 23 Geo. II. c. 24.

[o] See page 284.

[p] *Gild*, signified among the Saxons a fraternity, derived from the verb ᵹildan to pay, because every man paid his share towards the expenses of the community. And hence their place of meeting is frequently called the *Guild* or *Guild hall.*

[q] 10 Rep. 30. 1 Roll. Abr. 513.

How far parliament has incorporated.

The parliament, we observed, by its absolute and transcendant authority, may perform the act of incorporation, or any other act whatsoever: and actually did perform it to a great extent, by statute 39 Eliz. c. 5, which incorporated all hospitals and houses of correction founded by charitable persons, without farther trouble: and the same has been done in other cases of charitable foundations. But otherwise it has not formerly been usual thus to intrench upon the prerogative of the crown, and the king may prevent it when he pleases, by refusing his assent to the bill. And, in the particular instance before-mentioned, it was done, as sir Edward Coke observes,[r] to avoid the charges of incorporation and licenses of mortmain in small benefactions; which in his days were grown so great, that they discouraged many men from undertaking these pious and charitable works.

The king may grant the power of erecting corporations.

The king (it is said) may grant to a subject the power of erecting corporations,[s] though the contrary was formerly held:[t] that is, he may permit the subject to name the persons and powers of the corporation at his pleasure; but it is really the king that erects, and the subject is but the instrument: for though none but the king can make a corporation, yet *qui facit per alium, facit per se.*[u] In this manner the chancellor of the university of Oxford has power by charter to erect corporations; and has actually often exerted it, in the erection of several matriculated companies, now subsisting, of tradesmen subservient to the students.

A corporation must have a name.

When a corporation is erected, a name must be given to it; and by that name alone it must sue, and be sued, and do all legal acts; though a very minute variation therein is not [475] material.[v] Such name is the very being of its constitution; and, though it is the will of the king that erects the corporation, yet the name is the knot of its combination, without which it could not perform its corporate functions.[w] The name of incorporation, says sir Edward Coke, is as a proper name, or name of baptism; and therefore when a private founder gives his college or hospital a name, he does it only as a godfather; and by that same name the king baptizes the incorporation.[x]

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[r] 2 Inst. 722.

[s] Bro. *Abr. tit. Prerog.* 53. Viner. *Prerog.* 38, pl. 16.

[t] Yearbook, 2 Hen. VII. 13.

[u] 10 Rep. 33.

II. The rights and incapacities of a corporation.

II. After a corporation is so formed and named, it acquires many powers, rights, capacities, and incapacities, which we are next to consider. Some of these are necessarily and inseparably incident to every corporation; which incidents, as soon as a corporation is duly erected, are tacitly annexed of course.[y] As, 1. To have perpetual succession. This is the very end of its incorporation: for there cannot be a succession for ever without an incorporation;[z] and therefore all aggregate corporations have a power necessarily implied of electing members in the room of such as go off.[a] 2. To sue or be sued, implead or be impleaded, grant or receive, by its corporate name, and do all other acts as natural persons may. 3. To purchase lands, and hold them, for the benefit of themselves and their successors, which two are consequential to the former. 4. To have a common seal. For a corporation, being an invisible body, cannot manifest its intentions by any personal act or oral discourse; it therefore acts and speaks only by its common seal. For, though the particular members may express their private consents to any act, by words, or signing their names, yet this does not bind the corporation: it is the fixing of the seal, and that only, which unites the several assents of the individuals, who compose the community, and makes one joint assent of the whole.[b] 5. To make by-laws or private statutes for the better government of the corporation; which are binding upon [476] themselves, unless contrary to the laws of the land, and then they are void. This is also included by law in the very act of incorporation:[c] for, as natural reason is given to the natural body for the governing it, so by-laws or statutes are a sort of political reason to govern the body politic. And this right of making by-laws for their own government, not contrary to the law of the land, was allowed by the law of the twelve tables at Rome.[d] But no trading company is, with us, allowed to make by-laws, which may affect the king's prerogative, or the common profit of the people, under penalty of 40*l.* unless they be approved by the chancellor, treasurer, and chief justices, or the judges of assize in their circuits: and, even though they be so approved, still if contrary to law they are void.[e] These five powers are inseparably incident to every corporation, at least to every corporation *aggregate*, for two of them, though they may be practised, yet are very unnecessary to a corporation *sole; viz.* to have a corporate seal to testify his sole assent, and to make statutes for the regulation of his own conduct.

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[v] 10 Rep. 122.

[w] Gilb. Hist. C. P. 182.

[x] 10 Rep. 28.

[y] *Ibid.* 30. Hob. 211.

[z] 10 Rep. 26.

[a] 1 Roll. Abr. 514.

[b] Dav. 44, 48.

Letters patent act, 6 Geo. IV. c. 91.

By statute 6 Geo. IV. c. 91, amended by stat. 4 & 5 Wm. IV. c. 94, s. 1, the king is authorized, by letters patent, under the great seal, to grant to any company associated together for any trading, literary, charitable, or other purposes, although not incorporated, any privileges, which, according to the rules of the common law, it would be competent for his majesty to grant to any such company by any charter of incorporation. The provisions of this act are also extended by the statute 1 Vict. c. 73.

Privileges and disabilities which peculiarly attend an aggregate corporation.

There are also certain privileges and disabilities that attend an aggregate corporation, and are not applicable to such as are sole; the reason of them ceasing, and of course the law. It must always appear by attorney; for it cannot appear in person, being, as sir Edward Coke says,[f] invisible, and existing only in intendment and consideration of law. It can neither maintain, or be made defendant to, an action of battery or such like personal injuries: for a corporation can neither beat, nor be beaten, in its body politic.[g] A corporation cannot commit treason, or felony, or other crime, in its corporate capacity:[h] though its members may, in their distinct individual capacities.[i] Neither is it capable of suffering a traitor's or felon's punishment, for it is not liable to [477] corporal penalties, nor to attainder, forfeiture, or corruption of blood. It cannot be executor or administrator, or perform any personal duties; for it cannot take an oath for the due execution of the office. It cannot be seised of lands to the use of another;[j] for such kind of confidence is foreign to the end of its institution. Neither can it be committed to prison;[k] for its existence being ideal, no man can apprehend or arrest it. And therefore also it cannot be outlawed: for outlawry always supposes a precedent right of arresting, which has been defeated by the parties absconding, and that also a coporation cannot do: for which reasons the proceedings to compel a corporation to appear to any suit by attorney are always by distress on their lands and goods.[l] Neither can a corporation be excommunicated; for it has no soul, as is gravely observed by sir Edward Coke:[m] and therefore also it is not liable to be summoned into the ecclesiastical courts upon any account; for those courts act only *pro salute animæ*, and their sentences can only be enforced by spiritual censures: a consideration, which, carried to its full extent, would alone demonstrate the impropriety of these courts interfering in any temporal rights whatsoever.

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[c] Hob. 211.

[d] *Sodales legem quam volent, dum ne quid ex publica lege corrumpant, sibi ferunto.*

[e] Stat. 19 Hen. VII. c. 7. 11 Rep. 54.

[f] 10 Rep. 32.

Incidents and powers which belong to some corporations.

There are also other incidents and powers, which belong to some sort of corporations, and not to others. An aggregate corporation may take goods and chattels for the benefit of themselves and their successors, but a sole corporation cannot:[n] for such moveable property is liable to be lost or embezzled, and would raise a multitude of disputes between the successor and executor; which the law is careful to avoid. In ecclesiastical and eleemosynary foundations, the king or the founder may give them rules, laws, statutes, and ordinances, which they are bound to observe: but corpo- [478] rations merely lay, constituted for civil purposes, are subject to no particular statutes; but to the common law, and to their own bye-laws, not contrary to the laws of the realm.[o] Aggregate corporations also, that have by their constitution a head, as a dean, warden, master, or the like, cannot do any acts during the vacancy of the headship, except only appointing another: neither are they then capable of receiving a grant; for such corporation is incomplete without a head.[p] But there may be a corporation aggregate constituted without a head:[q] as the collegiate church of Southwell in Nottinghamshire, which consists only of prebendaries; and the governors of the Charter-house, London, who have no president or superior, but are all of equal authority. In aggregate corporations also, the act of the major part is esteemed the act of the whole.[r] By the civil law this major part must have consisted of two-thirds of the whole; else no act could be performed:[s] which perhaps may be one reason why they required three at least to make a corporation. But, with us, *any* majority is sufficient to determine the act of the whole body. And whereas, notwithstanding the law stood thus, some founders of corporations had made statutes in derogation of the common law, making very frequently the unanimous assent of the society to be necessary to any corporate act; (which king Henry VIII. found to be a great obstruction to his projected scheme of obtaining a surrender of the lands of ecclesiastical corporations) it was therefore enacted by statute 33 Hen. VIII. c. 27, that all private statutes shall be utterly void, whereby any grant or election, made by the head, with the concurrence of the major part of the body, is liable to be obstructed by any one or more, being the minority: but this statute extends not to any negative or necessary voice, given by the founder to the head of any such society.

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[g] Bro. *Abr. tit. Corporation*, 63.

[h] 10 Rep. 32.

[i] The civil law also ordains that, for the misbehaviour of a body corporate, the directors only shall be answerable in their personal capacities, *Ff.* 4, 3, 15.

[j] Bro. *Abr. tit. Feoffm. al use*, 40. Bacon of Uses, 347.

[k] Plowd. 538.

[l] Bro. *Abr. tit. Corporation*. 11 *Outlawry*, 72.

[m] 10 Rep. 32.

[n] Co. Litt. 46.

How far a corporation

We before observed that it was incident to every corporation, to have a capacity to purchase lands for themselves and successors: and this is regularly true at the common law.[t] But they are excepted out of the statute of wills:[u] so that no devise of lands to a corporation by will is good: except for charitable uses, by statute 43 Eliz. c. 4:[v] which exception is again greatly narrowed by the statute 9 Geo. II. c. 36. And also, by a great variety of statutes,[w] their privilege even of purchasing from any living grantor is much abridged: so that now a corporation, either ecclesiastical or lay, must have a license from the king to purchase;[x] before they can exert that capacity which is vested in them by the common law: nor is even this in all cases sufficient. These statutes are generally called the statutes of *mortmain;* all purchases made by corporate bodies being said to be purchases in *mortmain, in mortua manu:* for the reason of which appellation sir Edward Coke[y] offers many conjectures; but there is one which seems more probable than any that he has given us: *viz.* that these purchases being usually made by ecclesiastical bodies, the members of which (being professed) were reckoned dead persons in law, land therefore, holden by them, might with great propriety be said to be held in *mortua manu.*[z]

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[o] Lord Raym. 8.

[p] Co. Litt. 263, 264.

[q] 10 Rep. 30.

[r] Bro. *Abr. tit Corporation*, 31, 34.

[s] *Ff.* 3, 4, 3.

[479] can purchase land.

Statutes of mortmain.

The general *duties* of all bodies politic, considered in their corporate capacity, may, like those of natural persons, be reduced to this single one; that of acting up to the end or design, whatever it be, for which they were created by their founder.

The duties of a corporation.

[480]

III. I proceed therefore next to inquire, how these corporations may be *visited.* For corporations being composed of individuals, subject to human frailties, are liable, as well as private persons, to deviate from the end of their institution. And for that reason the law has provided proper persons to visit, inquire into, and correct all irregularities that arise in such corporations, either sole or aggregate, and

III. How a corporation may be visited.

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[t] 10 Rep. 30.

[u] 34 Hen. VIII. c. 5.

[v] Hob. 136.

[w] From *magna carta,* 9 Hen. III. c. 36, to 9 Geo. II. c. 36.

[x] By the civil law a corporation was incapable of taking lands, unless by special privilege from the emperor: *collegium, si nullo speciali privilegio subnixum sit, hæreditatem capere non posse, dubium non est. Cod.* 6, 24, 8.

[y] 1 Inst. 2.

[z] See further as to the statutes of *Mortmain, Principles of Real Property,* pp. 177—182.

whether ecclesiastical, civil, or eleemosynary. With regard to all ecclesiastical corporations, the ordinary is their visitor, so constituted by the canon law, and from thence derived to us. The pope formerly, and now the king, as supreme ordinary, is the visitor of the archbishop or metropolitan; the metropolitan has the charge and coercion of all his suffragan bishops; and the bishops in their several dioceses are in ecclesiastical matters the visitors of all deans and chapters, of all parsons and vicars, and of all other spiritual corporations. With respect to all lay corporations, the founder, his heirs, or assigns, are the visitors, whether the foundation be civil or eleemosynary; for in a lay incorporation the ordinary neither can nor ought to visit.[a]

As to civil corporations in this respect. I know it is generally said, that civil corporations are subject to no visitation, but merely to the common law of the land; and this shall be presently explained. But first, as I have laid it down as a rule that the founder, his heirs, or assigns, are the visitors of all lay corporations, let us inquire what is meant by the *founder*. The founder of all corporations in the strictest and original sense is the king alone, for he only can incorporate a society; and in civil incorporations, such as mayor and commonalty, &c. where there are no possessions or endowments given to the body, there is no other founder but the king: but in eleemosynary foundations, such as colleges and hospitals, where there is an endowment of lands, the law distinguishes, and makes two [481] species of foundation; the one *fundatio incipiens*, or the incorporation, in which sense the king is the general founder of all colleges and hospitals; the other *fundatio perficiens*, or the dotation of it, in which sense the first gift of the revenues is the foundation, and he who gives them is in law the founder: and it is in this last sense that we generally call a man the founder of a college or hospital.[b] But here the king has his prerogative: for, if the king and a private man join in endowing an eleemosynary foundation, the king alone shall be the founder of it. And, in general, the king being the sole founder of all civil corporations, and the endower the perficient founder of all eleemosynary ones, the right of visitation of the former results, according to the rule laid down, to the king; and of the latter to the patron or endower.

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[a] 10 Rep 31.

[b] *Ibid.* 33.

The jurisdiction as to which is vested in the court of king's bench.

The king being thus constituted by law visitor of all civil corporations, the law has also appointed the place, wherein he shall exercise this jurisdiction; which is the court of king's bench; where, and where only, all misbehaviours of this kind of corporations are inquired into and redressed, and all their controversies decided. And this is what I understand to be the meaning of our lawyers, when they say that these civil corporations are liable to no visitation; that is, that the law having by immemorial usage appointed them to be visited and inspected by the king their founder, in his majesty's court of king's bench, according to the rules of the common law, they ought not to be visited elsewhere, or by any other authority.[c] And this is so strictly true, that though the king by his letters patent had subjected the college of physicians to the visitation of four very respectable persons, the lord chancellor, the two chief justices, and the chief baron; though the college had accepted this charter with all possible marks of acquiescence, and had acted under it for near a century; yet in 1753, the authority of this provision coming in dispute, on an appeal preferred to these supposed [482] visitors, they directed the legality of their own appointment to be argued, and, as this college was merely a civil and not an eleemosynary foundation, they at length determined, upon several days solemn debate, that they had no jurisdiction as visitors; and remitted the appellant (if aggrieved) to his regular remedy in his majesty's court of king's bench.

Who is the visitor of an eleemosynary corporation.

As to eleemosynary corporations, by the dotation the founder and his heirs are of common right the legal visitors, to see that such property is rightly employed, as might otherwise have descended to the visitor himself: but, if the founder has appointed and assigned any other person to be visitor, then his assignee so appointed is invested with all the founder's power, in exclusion of his heir. Eleemosynary corporations are chiefly hospitals, or colleges in the universities. These were all of them considered, by the popish clergy, as of mere ecclesiastical jurisdiction: however, the law of the land judged otherwise; and with regard to hospitals, it has long been held,[d] that if the hospital be spiritual, the bishop shall visit; but if lay, the patron. This right of lay patrons was indeed abridged by statute 2 Hen. V. c. 1, which ordained, that the ordinary should visit *all* hospitals founded by subjects; though the king's right was reserved, to visit by his commissioners such as were of royal foundation. But the subject's right was in part restored by statute 14 Eliz. c. 5, which directs the bishop to visit such hospitals only, where no visitor is appointed by the founders thereof: and all the hospitals founded by virtue of the statute 39 Eliz. c. 5, are to be visited by such persons as shall be nominated by the respective founders. But still, if the founder appoints nobody, the bishop of the diocese must visit.[e]

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[c] This notion is perhaps too refined. The court of king's bench, (it may be said) from its general superintendent authority where other jurisdictions are deficient, has power to regulate all corporations where no special visitor is appointed. But not in the light of visitor: for, as its judgments are liable to be reversed by writs of error, it may be thought to want one of the essential marks of visitatorial power.

Colleges how visited.

Colleges in the universities (whatever the common law may now, or might formerly, judge) were certainly considered by the popish clergy, under whose direction they were, as *ecclesiastical*, or at least as *clerical*, corporations; and therefore the right of visitation was claimed by the ordinary of the diocese. [183] This is evident, because in many of our most ancient colleges, where the founder had a mind to subject them to a visitor of his own nomination, he obtained for that purpose a papal bulle to exempt them from the jurisdiction of the ordinary; several of which are still preserved in the archives of the respective societies. And in some of our colleges, where no special visitor is appointed, the bishop of that diocese, in which Oxford was formerly comprised, has immemorially exercised visitatorial authority; which can be ascribed to nothing else, but his supposed title as ordinary to visit this, among other ecclesiastical foundations. And it is not impossible, that the number of colleges in Cambridge, which are visited by the bishop of Ely, may in part be derived from the same original.

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[d] Yearbook, 8 Edw. III. 28. 8 Ass. 29.

[e] 2 Inst. 725.

But, whatever might be formerly the opinion of the clergy, it is now held as established common law, that colleges are lay corporations, though sometimes totally composed of ecclesiastical persons; and that the right of visitation does not arise from any principles of the canon law, but of necessity was created by the common law.[f] And yet the power and jurisdiction of visitors in colleges was left so much in the dark at common law, that the whole doctrine was very unsettled till the famous case of *Philips and Bury*.[g] In this the main question was, whether the sentence of the bishop of Exeter, who (as visitor) had deprived doctor Bury the rector of Exeter College, could be examined and redressed by the court of king's bench. And the three puisne judges were of opinion, that it might be reviewed, for that the visitor's jurisdiction could not exclude the common law; and accordingly judgment was given in that court. But the lord chief justice Holt was of a contrary opinion; and held, that by the common law the office of visitor is to judge according to the statutes of the college, and to expel and deprive upon just occasions, and to hear all appeals of course: and that from him, and him only, the party grieved ought to have redress: the founder having reposed in him so entire a confidence, that he will administer justice impartially, that his determinations are final, and examinable in no other court whatsoever. [484] And, upon this, a writ of error being brought into the house of lords, they concurred in Sir John Holt's opinion, and reversed the judgment of the court of king's bench. To which leading case all subsequent determinations have been conformable. But, where the visitor is under a temporary disability, there the court of king's bench will interpose, to prevent a defect of justice.[h] Also it is said,[i] that if a founder of an eleemosynary foundation appoints a visitor, and limits his jurisdiction by rules and statutes, if the visitor in his sentence exceeds those rules, an action lies against him; but it is otherwise, where he mistakes in a thing within his power.

IV. How corporations may be dissolved.

IV. We come now, in the last place, to consider how corporations may be dissolved. Any particular member may be disfranchised, or lose his place in the corporation, by acting contrary to the laws of the society, or the laws of the land: or he may resign it by his own voluntary act.[j] But the body politic may also itself be dissolved in several ways; which dissolution is the civil death of the corporation: and in this case their lands and tenements shall revert to the persons, or his heirs, who granted them to the corporation: for the law doth annex a condition to every such grant, that if the corporation be dissolved, the grantor shall have the lands again, because the cause of the grant faileth.[k] The grant is indeed only during the life of the corporation; which *may* endure for ever: but, when that life is determined by the dissolution of the body politic, the grantor takes it back by reversion, as in the case of every other grant for life. The debts of a corporation, either to or from it, are totally extinguished by its dissolution; so that the members thereof cannot recover, or be charged with them, in their natural capacities:[l] agreeable to that maxim of the civil law,[m] "*si quid universitati* "*debetur, singulis non debetur; nec, quod debet universitas,* "*singuli debent.*"

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[f] Lord Raym. 8.

[g] *Ibid*. 5. 4 Mod. 106. Show. 35. Skinn. 407. Salk. 403. Carthew, 180.

[h] Stra. 797.

[i] 2 Lutw. 1566.

[485]

1. By act of parliament.
2. By the natural death of all its members.
3. By surrendering.
4. By forfeiture.

A corporation may be dissolved, 1. By act of parliament, which is boundless in its operations. 2. By the natural death of all it's members, in case of an aggregate corporation. 3. By surrender of its franchises into the hands of the king, which is a kind of suicide. 4. By forfeiture of its charter, through negligence or abuse of its franchises; in which case the law judges that the body politic has broken the condition upon which it was incorporated, and thereupon the incorporation is void. And the regular course is to bring an information in nature of a writ of *quo warranto*, to inquire by what warrant the members now exercise their corporate power, having forfeited it by such and such proceedings. The exertion of this act of law, for the purposes of the state, in the reigns of king Charles and king James the second, particularly by seizing the charter of the city of London, gave great and just offence:

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[j] 11 Rep. 98.

[k] Co. Litt. 13.

[l] 1 Lev. 237.

[m] *Ff.* 3, 4, 7.

though perhaps, in strictness of law, the proceedings in most of them were sufficiently regular: but the judgment against that of London was reversed by act of parliament[o] after the Revolution: and by the same statute it is enacted, that the franchises of the city of London shall never more be forfeited for any cause whatsoever. And, because by the common law corporations were dissolved, in case the mayor or head officer was not duly elected on the day appointed in the charter or established by prescription, it is now provided,[p] that for the future no corporation shall be dissolved upon that account; and ample directions are given for appointing a new officer, in case there be no election, or a void one, made upon the prescriptive or charter day.

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[o] Stat. 2 W. & M. c. 8.

[p] Stat. 11 Geo. I. c. 4.

THE END.

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